Supreme Court, U.S.
FILED
APR 20 2007
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No. 06-1410

In The

Supreme Court of the United States

STATE OF IDAHO,

Petitioner,

v.

KRISPEN ESTRADA,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Idaho

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

After his conviction and sentence for rape, Krispen Estrada filed a petition for post-conviction relief in the Idaho district court, claiming ineffective assistance of counsel in sentencing. The district court determined that Estrada's counsel in the criminal case had provided deficient performance by failing to advise Estrada about his privilege against self-incrimination in regard to a court-ordered psychosexual evaluation. The court denied the claim, however, reasoning that Estrada was not prejudiced because he would have received the same sentence because the sentencing court could have properly drawn adverse inferences at sentencing, such as lack of remorse, non-amenability to treatment, and risk to the community, if Estrada had refused to participate in the evaluation. The Supreme Court of Idaho reversed the district court's finding of lack of prejudice, implicitly rejecting the district court's determination that the sentencing court may properly draw adverse inferences from silence at sentencing, and holding prejudice was shown because the evaluation "played a role" in sentencing. The question presented is:

Other than in finding the facts and circumstances of the offense, may a sentencing court draw adverse inferences from a defendant's refusal to cooperate in a presentencing evaluation?

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF IDAHO

The Attorney General for Idaho, on behalf of the State of Idaho, respectfully petitions for a writ of certiorari to review the judgment in this case of the Supreme Court of Idaho.

OPINIONS BELOW

The opinion of the Supreme Court of Idaho, App., *infra*, 1-14, is found at 143 Idaho 558, 149 P.3d 833.

JURISDICTION

The opinion of the Supreme Court of Idaho was issued on November 24, 2006. App., *infra*, 1. The petition for rehearing was denied on January 22, 2007. Id. at 49. Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant portion of the Fifth Amendment of the United States Constitution provides:

> No person . . . shall be compelled in any criminal case to be a witness against himself. . . .

STATEMENT OF THE CASE

Respondent Krispen Estrada committed a brutal crime, beating, choking and raping his estranged wife in front of their children. App., *infra*, 1. He was captured after a seven-hour armed standoff with police. Id. at 1-2. He pled guilty to one count of rape as part of a plea agreement with the state, and the trial court then ordered, pursuant to Idaho law, that he undergo a pre-sentence psychosexual evaluation. Id. at 2, 36-37.

Estrada initially refused to submit to the ordered psychosexual evaluation. Id. at 2, 37-38. His counsel, however, reminded him that the evaluation had been ordered by the court; told him that he, the attorney, wanted good evidence for sentencing; and stated, "We would not want the judge to consider your lack of cooperation to mean that you are not willing to comply with court orders." Id. at 2, 37-38.

After receiving his counsel's letter encouraging him to cooperate to avoid having the court conclude he would not comply with court orders, Estrada submitted to the psychosexual evaluation. Id. at 2, 37-38. One of the conclusions in the evaluation was that Estrada presented an ongoing risk of violence. Id. at 2. After considering evidence, including the evaluation, the trial court imposed a life sentence, with twenty-five years to be served before being eligible for parole. Id. at 3. The sentence was affirmed on direct appeal. Id. at 3.

Estrada petitioned for state post-conviction relief, claiming that his attorney provided ineffective assistance of counsel for failing to advise him that his right against self-incrimination allowed him to refuse to submit to the psychosexual evaluation. Id. at 3, 38-39. The district court

applied the two-prong standard of *Strickland v. Washington*, 466 U.S. 668 (1984), and concluded that counsel's performance was deficient because counsel failed to advise Estrada that his Fifth Amendment privilege against self-incrimination gave him the right to refuse to participate in the psychosexual evaluation. Id. at 40-42. The district court denied relief on the prejudice prong, however, finding that the sentencing judge (not the same judge as on post-conviction) "took a dim view of individuals who refused to cooperate with sexual offender evaluation or treatment." Id. at 46. The court applied *Mitchell v. United States*, 526 U.S. 314 (1999), and concluded that the sentencing court could have considered Estrada's refusal to submit to the evaluation as evidence "bearing on Estrada's remorse, his amenability to treatment, and/or his risk to the community." App., *infra*, 42-44. The sentencing court also could have concluded that Estrada was a "violent sexual offender" for purposes of sentencing "in the absence of proof to the contrary . . . ." Id. at 43. Because the sentencing court could have properly drawn these adverse inferences had Estrada refused to cooperate with the psychosexual evaluation, the district court concluded that the evidence did not show that invocation of the right to not cooperate in the psychosexual evaluation would have resulted in a lesser sentence, and therefore Estrada had shown no prejudice. Id. at 44-47.

The Idaho Court of Appeals affirmed, but on a different basis. Id. at 15-35. In addressing the deficient performance prong, the court concluded that the Fifth Amendment does provide a right to refuse cooperation with a court-ordered sentencing evaluation and that a sentencing court may draw no adverse inferences from such silence, but such was not established law at the time

counsel advised Estrada to cooperate in the evaluation; therefore, counsel's performance was not deficient. Id. at 18-30.

On discretionary review the Supreme Court of Idaho reversed the district court. Like the lower courts, it held that the Fifth Amendment right against self-incrimination applies to sentencing evaluations. Id. at 9-13. It also held that Estrada's counsel had misadvised Estrada about that right, making his performance deficient, rejecting the analysis of the court of appeals and finding that the Fifth Amendment right was established in Idaho precedent at the time counsel advised Estrada to submit to the evaluation. Id. at 13. The court then implicitly rejected the district court's analysis that there was no prejudice because Estrada's failure to cooperate in the evaluation would have led to permissible adverse inferences in sentencing, instead holding that Estrada had shown prejudice because he showed the evaluation "played a role" in sentencing. Id. at 13-14.

REASONS FOR GRANTING THE PETITION

In this case, the Supreme Court of Idaho has adopted an extremely narrow view of what adverse inferences a sentencing court may draw, which, while consistent with precedents from some jurisdictions, goes well beyond what this Court's precedents require and is in conflict with authority from other jurisdictions. This ruling warrants a grant of certiorari for two reasons:

First, this Court has applied the no adverse inference rule in sentencing only once. In *Mitchell v. United States*, 526 U.S. 314 (1999), this Court held that the Fifth

Amendment rule against drawing adverse inferences from silence applied to "factual determinations respecting the circumstances and details of the crime." *Id.* at 327-38. It specifically stated that it was not addressing the question of whether the no adverse inference rule applied to specific downward adjustments such as provided by federal sentencing, *Id.* at 330, and was silent as to what adverse inferences might be drawn at sentencing in jurisdictions, such as Idaho, that do not have specific downward adjustments in sentencing. Thus, this Court left open the question of whether the adverse inference rule applies at sentencing to prevent inferences from silence other than in finding the facts of the crime.

Second, because this Court has not addressed the no adverse inference rule's application in sentencing other than in *Mitchell*, lower courts have applied the no adverse inference rule in three different ways. Some jurisdictions hold that the rule does not apply beyond the specific holding of *Mitchell*, and allow adverse inferences to be drawn regarding any fact other than the facts of the actual crime itself. Others, generally looking primarily at this Court's statement in *Mitchell* that its holding does not address the propriety of specific downward adjustments, allow sentencing courts to draw adverse inferences that result in denial of a lesser sentence, but disallow adverse inferences that would result in an increased sentence. Finally, others, as the Supreme Court of Idaho has apparently done in this case, disallow all adverse inferences.

The *Mitchell* decision left open the question of whether the adverse inference rule prevents a sentencing court from drawing conclusions regarding the defendant's character, amenability to rehabilitation, remorse, acceptance of responsibility, or additional sentencing factors

other than the facts of the crime, based upon a defendant's refusal to cooperate in sentencing evaluations or other silence. Courts that have addressed this open question have done so in three broad, and conflicting, ways. What inferences may be drawn at sentencing from a defendant's refusal to assist in a court's efforts to evaluate sentencing factors other than the facts of the crime itself is an important question that can only be answered by this Court. Certiorari on this question, with a later remand for the Supreme Court of Idaho to reevaluate whether Estrada received ineffective assistance of counsel in light of the scope of the adverse inference rule in sentencing, is therefore appropriate.

A. The Decision Of The Supreme Court Of Idaho Expands The No Adverse Inference Rule Of The Privilege Against Self-Incrimination Far Beyond What This Court Has Required

The Fifth Amendment provides, in relevant part, that no person "shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. This right against self-incrimination "not only permits a person to refuse to testify against himself at a criminal trial in which he is the defendant, but also 'privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings.'" *Minnesota v. Murphy*, 465 U.S. 420, 426 (1984) (quoting *Lefowitz v. Turley*, 414 U.S. 70, 77 (1973)). The "sole concern" of the Fifth Amendment's right to silence is "the danger to a witness forced to give testimony leading to the infliction of 'penalties affixed to the criminal acts. . . .'" *Ullman v. United States*, 350 U.S. 422, 438-39

(1956) (quoting *Boyd v. United States*, 116 U.S. 616, 634 (1886)). When a criminal defendant exercises his privilege against self-incrimination, such silence may not be used as "evidence of guilt." *Griffin v. California*, 380 U.S. 609, 615 (1965).

This Court has analyzed the application of the Fifth Amendment right against self-incrimination to sentencing proceedings in only two cases. First, in *Estelle v. Smith*, 451 U.S. 454 (1981), the state of Texas introduced, in the capital sentencing portion of a bifurcated trial, a pre-trial psychological evaluation. The evaluation had been taken for determining competency, but was introduced at the sentencing trial as evidence of future dangerousness, a fact the state was required to prove to make Smith eligible for the death penalty. *Id.* at 457-58. The Court ultimately held that a defendant who neither initiates the psychological evaluation nor tries to introduce psychological evidence "may not be compelled to respond to a psychiatrist if his statements can be used against him at a capital sentencing proceeding." *Id.* at 468. The Court's reasoning was that Smith could not be made the "'deluded instrument' of his own execution." *Id.* at 462 (citation omitted). The Court specifically stated that it was not holding "that the same Fifth Amendment concerns are necessarily presented by all types of interviews and examinations that might be ordered or relied upon to inform a sentencing determination." *Id.* at 469 n.13.

Second, in *Mitchell v. United States*, 526 U.S. 314 (1999), Mitchell pled guilty to one count of conspiracy to distribute cocaine and three counts of distributing cocaine, but did not admit to the quantity of cocaine involved. 526 U.S. at 317. The quantity was important because it determined which minimum sentence applied to Mitchell's

conduct. *Id.* At sentencing the government attempted to meet its burden of proving the quantity of cocaine involved through the testimony of co-conspirators. *Id.* at 318-19. Mitchell did not testify. *Id.* The sentencing court found that the conspiracy involved more than five kilograms, requiring a mandatory minimum sentence of ten years (instead of a shorter required sentence), in part because it found Mitchell's refusal to explain her side of the story indicative of the credibility of the co-conspirators. *Id.* at 318-19.

In reversing, this Court first held that the potential for self-incrimination did not end with Mitchell's guilty plea. *Id.* at 321-27. This Court rejected the government's argument that Mitchell's plea constituted a waiver of the right against self-incrimination. *Id.* at 321-25. The stipulation to some facts by Mitchell in pleading guilty did not waive her right to silence on the facts still in dispute. *Id.*

The Court next rejected the lower court's holding that incrimination is complete once guilt has been determined. *Id.* at 325-26. The Court stated that incrimination does not end with a guilty plea: "Where the sentence has not yet been imposed a defendant may have a legitimate fear of adverse consequences from further testimony." *Id.* at 326. The "adverse consequence" Mitchell faced was that the range of sentence applicable to her was still to be decided by the quantity of drugs involved. *See id.* at 327 ("Petitioner faced imprisonment from one year upwards to life, depending on the circumstances of the crime.").

This Court then proceeded to apply, for the first time in sentencing, the no adverse inference rule. This rule, which prohibits using the defendant's invocation of the privilege against self-incrimination as evidence of guilt,

was announced by this Court in *Griffin v. California*, 380 U.S. 609 (1965). There this Court held that "the Fifth Amendment . . . forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt." *Id.* at 615. In *Mitchell* this Court applied the rule from *Griffin* to criminal sentencing "with regard to factual determinations respecting the circumstances and details of the crime." *Mitchell*, 526 U.S. at 327-28.

Rejecting a comparison of sentencing to civil cases, in which the no adverse inference rule does not apply, the Court stated that "the central purpose of the privilege – to protect a defendant from being the unwilling instrument of his or her own condemnation – remains of vital importance." *Id.* at 328-29. The Court then looked at *Estelle*, stating that *Estelle*'s reasoning that there was no basis to distinguish a capital sentencing from a trial "applies with full force here, where the Government seeks to use petitioner's silence to infer commission of disputed criminal acts." *Id.* at 329. "To say that an adverse factual inference may be drawn from silence at a sentencing hearing held to determine the specifics of the crime is to confine *Griffin* by ignoring *Estelle*." *Id.*

The Court concluded: "The question is whether the Government has carried its burden to prove its allegations while respecting the defendant's individual rights. The Government retains the burden of proving facts relevant to the crime at the sentencing phase and cannot enlist the defendant in this process at the expense of the self-incrimination privilege." *Id.* at 330. The Court reserved the issue of whether a court can properly consider silence in relation to a finding of lack of remorse or acceptance of responsibility that might justify a reduction in sentence.

Id. The Court then held: "By holding petitioner's silence against her in determining the facts of the offense at the sentencing hearing, the District Court imposed an impermissible burden on the exercise of the constitutional right against compelled self-incrimination." *Id.*

The opinion in *Mitchell* thus specifically stated no fewer than five times that it was limiting its holding regarding the no adverse inference rule to circumstances where the sentencing court was finding the facts of the crime itself.

The four-justice dissent[1] in *Mitchell* would not have extended the no adverse inference rule to sentencing at all. *Id.* at 332. The dissent first argued that the no adverse inference rule announced in *Griffin* was not historically rooted. *Id.* at 333-36. The dissent pointed out that a distinction between trial and sentencing is often drawn in Constitutional jurisprudence. *Id.* at 337-38. The dissent then addressed what it considered the "greatest" inconsistency of the opinion – "that its holding applies only to inferences drawn from silence 'in determining the facts of the offense.'" *Id.* at 338-39. The dissent noted that if the Court maintains this limitation on the application of the no adverse inference rule, the rule will not apply to "determinations of acceptance of responsibility, repentance, character, and future dangerousness . . . that is to say, to what is probably the *bulk* of what most sentencing is about." *Id.* at 340 (emphasis original).

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[1] Justice Thomas joined the dissent, but also provided his own dissenting opinion indicating a willingness to re-examine whether *Griffin* itself was rightly decided. *Id.* at 341-43.

> If, on the other hand, the Court ultimately decides – in the fullness of time and after a decent period of confusion in the lower courts – that the extension of *Griffin* announced today is *not* limited to 'determining the facts of the offense,' then it will have created a system in which we give the sentencing judge access to all sorts of out-of-court evidence, including the most remote hearsay, concerning the character of the defendant, his prior misdeeds, his acceptance of responsibility and determination to mend his ways, but declare taboo the most obvious piece of evidence standing in front of the judge: the defendant's refusal to cooperate with the court. Such a rule orders the judge to avert his eyes from the elephant in the courtroom when it is the judge's job to size up the elephant.

Id. at 340-41 (emphasis original).

Thus, both the majority and the dissent in *Mitchell* recognized that the Court's holding on the no adverse inference rule was limited to determining the facts and circumstances of the crime, leaving open the question of whether the defendant's refusal to speak or otherwise cooperate with the sentencing court extended to issues of acceptance of responsibility and remorse. *See also id.* at 330 (specifically reserving ruling on whether the no adverse inference rule applies to issues of remorse or acceptance of responsibility).

The express and repeated limitations of the no adverse inference rule stated in the *Mitchell* opinion are consistent with this Court's refusal to extend that rule to situations other than where the state bears the burden of proving the facts of the crime itself. In *Portuondo v. Agard*, 529 U.S. 61, 69 (2000), this Court distinguished *Griffin*

and found that the prosecutor's argument that the defendant had the opportunity to tailor testimony to evidence presented before he took the stand did not violate the no adverse inference rule. In *United States v. Robinson*, 485 U.S. 25, 32-34 (1988), this Court held that the no adverse inference rule did not prohibit argument that the defendant had the opportunity to tell his version of events at trial, in rebuttal of defense arguments that he did not. This Court has consistently applied the no adverse inference rule only to prevent the use of a "defendant's silence as substantive evidence of guilt." *Baxter v. Palmigiano*, 425 U.S. 308, 319 (1976); *see also Lakeside v. Oregon*, 435 U.S. 333, 338 (1978).

That *Mitchell* is properly seen as holding that the no adverse inference rule prevents only inferences about the facts of the crime is further demonstrated by subsequent decisions from this Court on the scope of the Sixth Amendment right to a jury. In *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), this Court concluded that any fact that increases a sentence beyond the statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. The Court in *Blakely v. Washington*, 542 U.S. 296, 303-04 (2004), decided that the "statutory maximum" for purposes of *Apprendi* is the maximum the judge may impose solely on the basis of the facts reflected in the verdict or guilty plea. Likewise, in *Ring v. Arizona*, 536 U.S. 584, 609 (2002), this Court held that aggravating factors making the defendant eligible for the death penalty must be proved to a jury beyond a reasonable doubt. Thus, as the law now stands, if the fact patterns of *Estelle* or *Mitchell* re-occurred they would not be sentencing cases, and there would be no doubt that the defendants would enjoy the privilege against self-incrimination and the

benefit of the no adverse inference rule because the state would bear the burden of proving to a jury, beyond a reasonable doubt, the facts at issue in those cases. Because *Estelle* and *Mitchell* are no longer factually sentencing cases, but instead addressed application of the no adverse inference rule to issues that must now be proved to a jury as elements of the crime itself, there are no opinions of this Court directly addressing the scope of the adverse inference rule in routine sentencing proceedings.

The Supreme Court of Idaho has expanded the holdings of *Estelle* and *Mitchell* beyond their stated limitations, effectively forbidding taking any adverse inference from a defendant's decision to not cooperate with presentence evaluations. Whether that broad expansion of the rule is required by the United States Constitution is a question that only this Court can definitively answer, and which merits this Court's consideration.

B. The Lower Courts Are Divided Between Those Jurisdictions That Allow No Adverse Inferences At Sentencing, Those That Allow Adverse Inferences At Sentencing Except To Show The Facts Of The Underlying Crime, And Those That Prohibit Adverse Inferences That Increase A Sentence But Allow Adverse Inferences In Denying A Decrease Of The Sentence

By reversing the district court's conclusion that there was no prejudice to Estrada because the sentencing court could properly have drawn some adverse inferences from Estrada's silence, the Supreme Court of Idaho came out on one end of a spectrum of cases addressing application of the right against self-incrimination at sentencing. Given the limited guidance provided by this Court prior to

Mitchell and in *Mitchell* itself, courts that have addressed this question have varied widely in their determinations of what inferences courts may or may not draw from a defendant's decision to remain silent or otherwise refuse to participate in post-conviction sentencing evaluations or interviews. These variations may be categorized into three basic groups.

At one end of the spectrum are courts that allow no or virtually no inferences from silence. As noted above, the Supreme Court of Idaho held that Estrada's trial counsel's performance was deficient for informing Estrada that he should cooperate in the court-ordered psychosexual examination so the sentencing court would not draw an adverse inference from a lack of cooperation. App., *infra*, 2, 13. The Supreme Court of Idaho further reversed the district court's conclusion that Estrada was not prejudiced by that advice because the sentencing court would have drawn certain adverse inferences from a decision to not participate in the court-ordered psychosexual evaluation, Id. at 42-47, and held that Estrada could show prejudice merely by showing that the evaluation he submitted to on advice of counsel "played a role" in the sentencing. Id. at 13-14. The Supreme Court of Idaho thus joined other courts from other jurisdictions that have held that no adverse inferences can be drawn from silence at sentencing.

Examples of courts that have interpreted the no adverse inference rule to apply to all factual findings at sentencing include the supreme courts of Michigan, Montana, and South Dakota. *See People v. Wright*, 430 N.W.2d 133, 138 n.13 (Mich. 1988) (defendant enjoys right to refuse participation in pre-sentence psychological evaluation that will be used to determine severity of

sentence, noting that the no adverse inference rule would apply to invocation of silence); *State v. Rennaker*, 150 P.3d 960, 967-69 (Mont. 2007) (court may not draw inference of lack of remorse from silence); *see also State v. Kauk*, 691 N.W.2d 606, 610 (S.D. 2005) (stating that *Mitchell* "extend[ed] the right to remain silent to sentencing proceedings and [held] that negative inferences cannot be drawn from the exercise of that right during such proceedings").

At the opposite end of the spectrum stand those courts that allow adverse inferences other than in finding the facts of the crime. In *Lee v. State*, 36 P.3d 1133 (Wyo. 2001), the defendant, convicted on two counts of third-degree sexual assault, was ordered to undergo a psychological evaluation. When he refused, the district court informed him that his refusal would be held against him in sentencing. *Id.* at 1137. Relying on *Mitchell*, Lee asserted on appeal that consideration of his refusal to cooperate with the evaluation violated his right to silence. *Id.* at 1141. In rejecting this argument, the Supreme Court of Wyoming pointed out that *Mitchell* involved compelling a defendant to testify about the facts of the crime – specifically, the amount of drugs involved – which could determine the range of the sentence she received. *Id.* The case before it, however, involved an evaluation that was a required part of the pre-sentence investigation (PSI) in sex crime convictions. *Id.* The failure to cooperate in the PSI is properly considered as evidence of the character of the defendant. *Id.* Thus, the court concluded, it was the defendant's "right to refuse the assessment and the district court's right to consider such refusal in determining the appropriate sentence." *Id. See also Lee v. Crouse*, 451 F.3d 598, 602-05 (10th Cir. 2006) (Rejecting Lee's federal habeas corpus challenge, stating "we conclude it remains

unanswered by the Supreme Court whether a sentencing court in a non-capital case may, for purposes other than determining the facts of the offense of conviction, draw an adverse inference from a criminal defendant's refusal to testify or cooperate").

Other decisions limiting the no adverse inference rule to the facts of the crime include: *State v. Muscari*, 807 A.2d 407, 416 (Vt. 2002) (*Mitchell* limited to adverse factual inferences related to crime; a court may "consider whether a defendant has accepted responsibility for the offense at sentencing without violating his privilege against self-incrimination"); and *Smith v. State*, 119 P.3d 411, 422-24 (Wyo. 2005) (finding *Mitchell* inapposite where jury had already found critical facts of crime bearing on the severity of sentence). *See also State v. Spencer*, 70 P.3d 1226, 1228-30 (Kan. App. 2003) (distinguishing *Mitchell* on the basis that pre-sentence risk assessment was not "for the purpose of determining the facts, circumstances, or details of the crime charged" and Spencer was not entitled to a "beneficial assessment" by virtue of her silence); *People v. Brady*, 765 N.E.2d 289, 291-92 (N.Y. 2002) (distinguishing *Mitchell* based upon nature of sentencing proceedings Mitchell faced); and *State v. Heffran*, 384 N.W.2d 351, 353-55 (Wis. 1986) (rejecting application of *Estelle* to presentence investigations on basis that such investigations are not related to "element upon which the state still has the burden of proof").

In between these ends of the spectrum are courts that allow a sentencing court to draw inferences from a defendant's silence in declining to find downward adjustments of a sentence, but do not allow inferences that would increase the sentence. *See, e.g., United States v. Rivera*, 201 F.3d 99, 101-02 (2d Cir. 1999) (disallowing increase in

sentence from silence); *United States v. Warren*, 338 F.3d 258, 264-65 (3d Cir. 2003) (drawing distinction between "penalty," which is not allowed based on silence, and "denied benefit," which is allowed based on silence); *State v. Kamana'o*, 82 P.3d 401, 407-10 (Hawai'i 2003) (sentencing court may not infer a lack of remorse to impose a harsher sentence); *Commonwealth v. Mills*, 764 N.E.2d 854, 865-66 (Mass. 2002) (sentencing court may not increase sentence based upon refusal to admit guilt, but noting that this is a proper factor in consideration of more lenient sentence); *Dzul v. State*, 56 P.3d 875, 879-85 (Nev. 2002) (adopting "benefit vs. penalty" analysis and finding constitutional a requirement of a positive evaluation as condition of probation eligibility). *See also United States v. McQuay*, 7 F.3d 800, 802-03 (8th Cir. 1993) (lack of cooperation with authorities proper grounds for denial of reduction for acceptance of responsibility). This was the approach adopted by the district court in this case. App., *infra*, 44-46 (citing *Dzul*, *supra*).

Review of the application of the no adverse inference rule at sentencing by courts of various jurisdictions shows that those courts are widely divergent in their conclusions about the scope of the rule. These differences arise from the question left open in *Mitchell* regarding the scope of application of the no adverse inference rule in sentencing. Because only this Court can finally determine this important question, certiorari in this case is appropriate.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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149 P.3d 833

Supreme Court of Idaho,
Boise, September 2006 Term.
Krispen ESTRADA, Petitioner-Appellant,
v.
STATE of Idaho, Respondent.
No. 30821/32755.

Nov. 24, 2006.
Rehearing Denied Jan. 22, 2007.

Molly J. Huskey, State Appellate Public Defender, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General, Boise, for respondent. John C. McKinney argued.

TROUT, Justice.

This Court has granted Appellant Krispen Estrada's request for review of an Idaho Court of Appeals decision upholding the district court's denial of Estrada's petition for post-conviction relief. The petition was grounded on Estrada's ineffective assistance of counsel claim, which was based on his attorney's failure to advise Estrada of his Fifth Amendment privilege to refuse to submit to a court-ordered psychosexual evaluation for sentencing purposes.

I. FACTUAL AND PROCEDURAL BACKGROUND

In the underlying criminal case, Estrada pleaded guilty to the rape of his estranged wife. An associated charge of kidnapping was dismissed. From the record in that case it appears that Estrada's crime was brutal. He choked and battered the victim before raping her, and committed these acts in the presence of his five young children. After the victim and children were able to leave

the house, Estrada engaged in a seven-hour armed stand-off with police before he surrendered.

At the plea hearing, the district court advised Estrada that he was waiving his constitutional right against self-incrimination. After accepting Estrada's plea, the district court ordered a psychosexual evaluation of Estrada pursuant to Idaho Code section 18-8316. Estrada then wrote to the district court, asserting that the evaluation was unnecessary and caused a frustrating delay in his sentencing. Estrada's attorney responded by writing a letter to Estrada advising him that the evaluation was not a delay tactic, but "must be completed before sentencing." The attorney also commented, "I want every single good piece of evidence that I can get my hands on to be able to argue at your sentencing." Based on the letter, Estrada decided to participate in the evaluation. Later, however, Estrada failed to complete certain evaluation forms, which prompted the evaluator, Larry Gold (Gold), to contact Estrada's attorney to relay Estrada's refusal to cooperate. The attorney sent Estrada another letter, in which he noted that the evaluation was ordered by the district court. The attorney wrote, "We would not want the judge to consider your lack of cooperation to mean that you are not willing to comply with court orders." Thereafter, Estrada participated in the evaluation, which took place in the county jail.

The evaluation was filed with the district court and included a number of unfavorable and derogatory comments about Estrada, including references to his potential for future violent actions. Estrada's attorney did not attempt to suppress the evaluation, but instead pointed to the evaluator's observation that Estrada was not a perpetrator on strangers and Estrada's risk to children was

"nonexistent." Nevertheless, the district court imposed a life sentence, twenty-five years fixed, relying in part on the evaluation's conclusion that Estrada had an "extreme violent nature" and a low level of treatment motivation. The district court summed up the evaluation as indicating "a serious problem and danger involved in releasing you [Estrada] back into society." The district court also observed the violent nature of the rape, noted Estrada's two prior felony convictions, and emphasized the protection of the victim and her family as the "guiding principle" by which the sentence was determined.

The sentence was affirmed on appeal. Estrada then filed a petition for post-conviction relief, claiming ineffective assistance of counsel. Estrada argued his attorney should have advised him that even after entering a guilty plea, he still retained his right against self-incrimination and was not required to participate in the psychosexual evaluation. Estrada also claimed his attorney was ineffective in not moving to suppress the evaluation on the grounds that it was obtained in violation of his Fifth Amendment privilege. Had the court not considered the evaluation, Estrada contended, he would have received a more favorable sentence.

After an evidentiary hearing, the district court denied the petition.[1] The court concluded that Estrada did have a Fifth Amendment right against self-incrimination relating to the psychosexual evaluation and his attorney was deficient in failing to advise him of such. Applying the test articulated in *Strickland v. Washington,* 466 U.S. 668, 104

[1] Because the judge who had issued Estrada's sentence had by this time retired, a different district judge presided.

S.Ct. 2052, 80 L.Ed.2d 674 (1984), the district court concluded, however, that Estrada was not prejudiced by the deficiency under the second prong of the *Strickland* test because the psychosexual evaluation did not affect the length of his sentence. On appeal, the Court of Appeals agreed that the privilege against self-incrimination applied to psychosexual evaluations ordered by the court for sentencing. The Court of Appeals further concluded that Estrada's attorney's performance was not deficient because "no decision of the Idaho appellate courts or of the United States Supreme Court had held that a defendant may invoke the privilege against self-incrimination in a court-ordered mental health evaluation conducted for sentencing in a non-capital case." Because the attachment of the privilege was "not clear" when Estrada's evaluation occurred, the court concluded, Estrada's attorney could not be faulted for failing to give this advice. As to the attorney's failure to move to suppress the evaluation, the court concluded that it did not constitute deficient representation because Estrada waived his right by failing to invoke it before or during the evaluation. Finding no deficiency, the Court of Appeals affirmed the district court's order denying post-conviction relief without addressing the prejudice prong of the *Strickland* test. This Court granted Estrada's petition for review.

II. STANDARD OF REVIEW

While this Court gives serious consideration to the views of the Court of Appeals when considering a case on review from that court, this Court reviews the district court's decisions directly. *State v. Rogers,* 140 Idaho 223, 226, 91 P.3d 1127, 1130 (2004). Where the district court conducts an evidentiary hearing in a post-conviction

proceeding, the court's findings of fact will not be disturbed on appeal unless clearly erroneous. *Ray v. State,* 133 Idaho 96, 98, 982 P.2d 931, 933 (1999). The reviewing court, however, exercises free and independent review of the district court's application of law. *Hollon v. State,* 132 Idaho 573, 976 P.2d 927, 930 (1999). Constitutional issues are pure questions of law over which this Court exercises free review. *Quinlan v. Idaho Com'n for Pardons and Parole,* 138 Idaho 726, 729, 69 P.3d 146, 149 (2003).

In reviewing claims for ineffective assistance of counsel, the Court utilizes the two-prong test set forth in *Strickland v. Washington, supra., Mitchell v. State,* 132 Idaho 274, 277, 971 P.2d 727, 730 (1998). To prevail on such a claim, an applicant for post-conviction relief must demonstrate (1) counsel's performance fell below an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's errors, the result would have been different. *Mitchell,* 132 Idaho at 277, 971 P.2d at 730; *Strickland,* 466 U.S. at 687-88, 692, 104 S.Ct. at 2064-65, 2067, 80 L.Ed.2d at 693-94, 696-97. When evaluating an ineffective assistance of counsel claim, strategic and tactical decisions will not be second-guessed or serve as a basis for post-conviction relief unless the decision is shown to have resulted from inadequate preparation, ignorance of the relevant law or other shortcomings capable of objective review. *Pratt v. State,* 134 Idaho 581, 584, 6 P.3d 831, 834 (2000). When considering whether an attorney's failure to file a motion to suppress constitutes deficient performance, the Court examines the probability of success of such a motion in order to determine whether counsel's decision was within the wide range of permissible discretion and trial strategy. *Hollon,* 132 Idaho at 579, 976 P.2d at 933.

III. DISCUSSION

A. Critical stage under the Sixth Amendment

The first question presented by this case is whether a court-ordered psychosexual evaluation constitutes a critical stage of litigation at which the Sixth Amendment right to counsel applies. While neither party in this case directly raises this issue, the question is indirectly raised as a necessary precursor to the arguments presented regarding Estrada's claim for ineffective assistance of counsel.

The Sixth Amendment guarantees a criminal defendant the right to counsel during all "critical stages" of the adversarial proceedings against him. *United States v. Wade,* 388 U.S. 218, 224, 87 S.Ct. 1926, 1931, 18 L.Ed.2d 1149, 1156 (1967); *State v. Ruth,* 102 Idaho 638, 637 P.2d 415 (1981). A defendant's right to effective assistance of counsel "extends to all critical stages of the prosecution where his substantial rights may be affected, and sentencing is one such stage." *Retamoza v. State,* 125 Idaho 792, 796, 874 P.2d 603, 607 (Ct.App.1994) (citing *Mempa v. Rhay,* 389 U.S. 128, 134, 88 S.Ct. 254, 256, 19 L.Ed.2d 336, 340 (1967)). In determining whether a particular stage is "critical," it is necessary "to analyze whether potential substantial prejudice to defendant's rights inheres in the particular confrontation and the ability of counsel to help avoid that prejudice." *Wade,* 388 U.S. at 227, 87 S.Ct. at 1932, 18 L.Ed.2d at 1157. "[I]f the stage is not critical, there can be no constitutional violation, no matter how deficient counsel's performance." *United States v. Benlian,* 63 F.3d 824, 827 (9th Cir.1995).

It makes no sense that a defendant would be entitled to counsel up through conviction or entry of a guilty plea,

and would also be entitled to representation at sentencing, yet would not be entitled to the advice of counsel in the interim period regarding a psychosexual evaluation. The analysis in *Estelle v. Smith,* 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981), is instructive. In *Estelle,* the United States Supreme Court ruled that the capital defendant's pre-trial psychiatric evaluation was a critical stage of the proceedings. *Id.* at 470, 101 S.Ct. at 1877, 68 L.Ed.2d at 373-74. The Court stated the defendant had a Sixth Amendment right to the assistance of counsel *before* submitting to the interview, observing that it "is central to [the Sixth Amendment] principle that in addition to counsel's presence at trial, the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial." *Id.* at 470-71, 101 S.Ct. at 1876-77, 68 L.Ed.2d at 373-74 (quotation omitted).

A psychosexual exam concerned with the future dangerousness of a defendant is distinguishable from a "routine" presentence investigation. Specifically, Idaho Rule of Criminal Procedure 32 does not require a defendant's participation in a presentence investigation report, whereas I.C. § 18-8316 states, "If ordered by the court, an offender . . . shall submit to [a psychosexual] evaluation. . . ." The presentence report relies greatly on information already available in public records, such as educational background, residence history and employment information. *See* I.C.R. 32(b). In contrast, a psychosexual evaluation like the one Estrada faced is more in-depth and personal, and includes an inquiry into the defendant's sexual history, with verification by polygraph being highly recommended. Because of the nature of the

information sought, a defendant is more likely to make incriminating statements during a psychosexual evaluation than during a routine presentence investigation. As the district court in this case concluded, "the psychosexual evaluation contained information concerning Estrada's '*future dangerousness.*'"

Importantly, the *Estelle* Court recognized that the defendant was not seeking a right to have counsel actually present during the exam. *Id.* at 471, n. 14, 101 S.Ct. at 1877, n. 14, 68 L.Ed.2d at 374, n. 14. This clarification reflects a difference between the "limited right to the appointment and presence of counsel recognized as a Fifth Amendment safeguard in *Miranda*" and a defendant's Sixth Amendment right to assistance of counsel. *See id; see also State v. Tinkham,* 74 Wash.App. 102, 871 P.2d 1127, 1131 (1994) (ruling a court-ordered psychological exam to determine a defendant's future dangerousness for sentencing purposes is a critical stage requiring the assistance of counsel, but clarifying "we are not holding that counsel has a right to be present, only that the defendant has the right to advice"). This Court's finding that a Sixth Amendment right to *assistance* of counsel in the critical stage of a psychosexual evaluation inquiring to a defendant's future dangerousness, does not necessarily require the *presence* of counsel during the exam. Because Estrada does not argue his attorney should have been present during the evaluation, this ruling is limited to the finding that a defendant has a Sixth Amendment right to counsel regarding only the decision of whether to submit to a psychosexual exam.

Because Estrada does have a right to at least the advice of counsel regarding his participation in the psychosexual evaluation, we proceed to determine whether Estrada's counsel was effective in carrying out that role.

B. Ineffective assistance of Counsel

Estrada claims he was denied effective assistance of counsel in violation of the Sixth Amendment "assistance of counsel" clause, applied to the states via the Fourteenth Amendment due process clause, and in violation of the right to counsel clause of Article 1, § 13 of the Idaho Constitution. Both Estrada and the State have limited their analysis of ineffective assistance of counsel to the federal framework; this Court's analysis will be similarly restricted. *See State v. Odiaga,* 125 Idaho 384, 387, 871 P.2d 801, 804 (1994).

The United States Supreme Court established the standard for a claim of ineffective assistance of counsel in *Strickland v. Washington, supra. Strickland* sets forth two components necessary to a criminal defendant's claim of ineffective assistance of counsel:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

466 U.S. at 687, 104 S.Ct. at 2064, 80 L.Ed.2d at 693.

1. Deficiency

In evaluating the potential deficiency of Estrada's attorney, this Court must first address whether Estrada could assert the Fifth Amendment privilege against self-incrimination during the psychosexual evaluation.

The availability of the Fifth Amendment privilege against self-incrimination "does not turn upon the type of proceeding in which its protection is invoked, but upon the nature of the statement or admission and the exposure which it invites." *Application of Gault,* 387 U.S. 1, 49, 87 S.Ct. 1428, 1455, 18 L.Ed.2d 527, 558 (1967) (noting the privilege may be claimed in a civil or administrative proceeding if the statement is or may be inculpatory). This Court's decisions clearly indicate that both at the point of sentencing and earlier, for purposes of a psychological evaluation, a defendant's Fifth Amendment privilege against self-incrimination applies.[2] *See State v. Lankford,* 116 Idaho 860, 871, 781 P.2d 197, 208 (1989) ("The fifth amendment privilege against self-incrimination and the sixth amendment right to counsel apply to custodial psychiatric exams conducted prior to sentencing as well as those conducted prior to trial."); *State v. Wilkins,* 125 Idaho 215, 217-18, 868 P.2d 1231, 1233-34 (1994) (holding that the Fifth Amendment privilege protects a defendant against compelled testimony at the sentencing hearing in a non-capital case); *State v. Odiaga,* 125 Idaho 384, 387, 871 P.2d 801, 804 (1994) ("Following Idaho's repeal of the

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[2] This Court distinguishes between the Fifth Amendment privilege against self incrimination and the framework set out under *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) to protect those rights in certain circumstances. *Id. Miranda* warnings are merely a method of protecting one's Fifth Amendment rights. That *Miranda* is not required does not mean the privilege against self-incrimination does not exist. *See Minnesota v. Murphy,* 465 U.S. 420, 430-34, 104 S.Ct. 1136, 1143-45, 79 L.Ed.2d 409, 421-24 (1984) (noting privilege could have been invoked during interview with probation officer, but ruling *Miranda* warnings not required because the interview was not a "custodial interrogation"). This case does not address *Miranda,* and this Court does not hold that it was necessary for Gold to *Mirandize* Estrada before conducting the psychosexual evaluation.

insanity defense, no statutory scheme remains through which a psychological evaluation can be compelled without threatening the rights guaranteed under both [the Fifth Amendment to the United States Constitution and article I, section 13, of the Idaho Constitution]."); *State v. Wood,* 132 Idaho 88, 100, 967 P.2d 702, 714 (1998) (noting that "[i]f a psychiatrist or psychologist had been appointed by the court for purposes of a presentence investigation, counsel for Wood would have had the opportunity to advise his client of the possible uses of the information *and of the privilege against self-incrimination.*").

The real issue presented by this case is the significance and extent of a defendant's right against self-incrimination. The State argued in its briefing and at oral argument that this Court should interpret incrimination extremely narrowly, such that a defendant's right not to disclose applies only to matters that would subject him to additional criminal charges or that would prompt a judge to exceed the sentencing standards that would otherwise apply. Incrimination is implicated not just when additional charges could be filed, but also when punishment could be enhanced as a result of the defendant's statements. *Pens v. Bail,* 902 F.2d 1464 (9th Cir.1990) (holding that use of admission of past crimes, during state-ordered psychotherapeutic treatment, to enhance sentence violated defendant's right against self-incrimination); *Jones v. Cardwell,* 686 F.2d 754, 756 (9th Cir.1982) (holding that defendant may invoke privilege against self-incrimination where sentencing court uses confession obtained from state's agent to enhance sentence) (citing *Estelle,* 451 U.S. at 463, 101 S.Ct. at 1873, 68 L.Ed.2d at 369, *Gault,* 387 U.S. at 49, 87 S.Ct. at 1455, 18 L.Ed.2d at 558). *See also* I.C. § 19-3003; *State v. Anderson,* 130 Idaho 765, 770, 947

P.2d 1013, 1018 (Ct.App.1997). As to limiting incrimination to situations where sentence guidelines or standards could be exceeded, that would be meaningless in Idaho because no such sentencing guidelines or standards exist here. In the case of rape, the duration of sentence authorized by the State of Idaho ranges from one year to the life of the defendant. I.C. § 18-6101. Imposition of a harsher sentence within this expansive range based on a defendant's statements in a psychological evaluation is a violation of the right against self-incrimination.

The district court found that under *Strickland,* Estrada's attorney was deficient in failing to inform Estrada of his right to assert the privilege against self-incrimination. The judge's findings on this point are not clearly erroneous and are affirmed by this Court. *Strickland* sets an "objective standard of reasonableness" for judging whether errors in an attorney's performance are serious enough to render that performance defective. 466 U.S at 688, 104 S.Ct. at 2064, 80 L.Ed.2d at 693-94. *See also State v. Hairston,* 133 Idaho 496, 511, 988 P.2d 1170, 1185 (1999). "There is 'a strong presumption that counsel's performance falls within the wide range of professional assistance.'" *Hairston,* 133 Idaho at 511, 988 P.2d at 1185 (citing *Aragon v. State* 114 Idaho 758, 760, 760 P.2d 1174, 1176 (1988)). Under *Strickland,* "[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." 466 U.S at 688, 104 S.Ct. at 2064, 80 L.Ed.2d at 693-94. Given the state of the law established by *Estelle, Wilkins, Odiaga, Wood,* and *Lankford,* this Court cannot find that Estrada's attorney acted reasonably under prevailing standards of professional norms. *See Estelle,* 451 U.S. at 470, 101 S.Ct. at 1877, 68 L.Ed.2d at 373-74; *Wilkins,* 125 Idaho at 217-18,

868 P.2d at 1233-34; *Odiaga,* 125 Idaho at 387, 871 P.2d at 804; *Wood,* 132 Idaho at 100, 967 P.2d at 714; *Lankford,* 116 Idaho at 871, 781 P.2d at 208; *Strickland,* 466 U.S at 688, 104 S.Ct. at 2064, 80 L.Ed.2d at 693-94. While no Idaho Supreme Court or United States Supreme Court case has specifically articulated a Fifth Amendment right against self-incrimination as it applies to psychosexual evaluations that may support a harsher sentence in a non-capital case, the case law nevertheless indicates that the Fifth Amendment applies to psychosexual evaluations. We affirm the district court's conclusion that Estrada's attorney was deficient in failing to inform his client of this right.

Estrada also alleges ineffective assistance of counsel by claiming his attorney was deficient in failing to file a motion to suppress the psychosexual evaluation. Given our conclusion that Estrada's attorney was deficient in failing to advise him of his Fifth Amendment right at the time of participation in the evaluation, we need not address Estrada's second basis for alleging deficient performance.

2. Prejudice

In addition to showing deficient performance under the first prong of *Strickland,* a criminal defendant claiming ineffective assistance of counsel must demonstrate that the deficiency resulted in prejudice. 466 U.S. at 687, 104 S.Ct. at 2064, 80 L.Ed.2d at 693. A defendant shows prejudice by establishing "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694, 104 S.Ct. at 2068, 80 L.Ed.2d at 698. Further, "[a] reasonable

probability is a probability sufficient to undermine confidence in the outcome." *Id.*

The sentencing judge's specific, repeated references to the psychosexual evaluation suggest that it did play an important role in the sentencing. While we do not pass judgment in any way on whether the sentence actually imposed on Estrada was unreasonable or excessive, nevertheless, Estrada has met his burden of showing that the evaluation played a role in his sentence. Therefore, Estrada has demonstrated prejudice as a result of his attorney's failure to advise him of his Fifth Amendment rights.

IV. CONCLUSION

Estrada has met his burden of showing ineffective assistance of counsel in his attorney's failure to advise him of his Fifth Amendment right against self-incrimination and in the resulting prejudice through the sentencing judge's reliance on the psychosexual evaluation. This case is reversed and remanded to the district court for resentencing.

Chief Justice SCHROEDER and Justices EISMANN, BURDICK and JONES concur.

2005 WL 2436232

Court of Appeals of Idaho.
Krispen ESTRADA, Petitioner-Appellant,
v.
STATE of Idaho, Respondent.
No. 30821.

Oct. 4, 2005.

Molly J. Huskey, State Appellate Public Defender, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Kristina M. Schindele, Deputy Attorney General, Boise, for respondent.

LANSING, Judge.

After being convicted of rape, Krispen Estrada filed an action for post-conviction relief in which he alleged that he had been compelled to submit to a psychosexual evaluation for sentencing purposes in violation of his Fifth Amendment privilege against self-incrimination. Estrada claimed that he had received ineffective assistance of counsel because his defense attorney did not advise him of his privilege to refuse the psychosexual evaluation and did not move to suppress the evaluator's report. Following an evidentiary hearing, the trial court denied Estrada's claims. We affirm.

I.

FACTS AND PROCEDURE

In the underlying criminal case, Estrada pleaded guilty to the rape of his estranged wife in violation of Idaho Code § 18-6101, and an associated charge of kidnapping was

dismissed. Prior to sentencing, the district court ordered a psychosexual evaluation of Estrada pursuant to I.C. § 18-8316. Estrada initially was uncooperative with the evaluator, and he wrote a letter to the court expressing his view that the evaluation was unnecessary. Ultimately, however, at the urging of counsel, Estrada submitted to the evaluation. The evaluator issued a report that did not favor Estrada, concluding that he was in the "maximum risk range" on the sexual assault scale and on the violence scale. The district court imposed a unified life sentence with a twenty-five-year determinate term, relying significantly on the negative evaluation. This Court affirmed the sentence on direct appeal. *State v. Estrada,* Docket No. 27737, 138 Idaho 303, 62 P.3d 651 (Ct.App. July 23, 2002) (unpublished).

Thereafter, Estrada filed a petition for post-conviction relief, asserting claims of ineffective assistance of counsel relating to his participation in the psychosexual evaluation. Estrada contended that his trial attorney's performance was deficient in that the attorney did not advise him that, even after his guilty plea, he continued to possess a Fifth Amendment privilege against self-incrimination and that, as a result, he could not be compelled to participate in the court-ordered psychosexual evaluation. Estrada also asserted that his attorney was ineffective for failing to move to suppress the evaluation report and preclude its consideration at sentencing on the basis that the evaluation was obtained in violation of Estrada's right against self-incrimination.

After an evidentiary hearing, the district court held that defense counsel's performance was deficient in that he did not advise Estrada of his Fifth Amendment privilege with respect to the evaluation. Based upon this

finding, the district court did not reach the remaining issues regarding deficient performance. The district court concluded, however, that Estrada had suffered no prejudice as a result of the deficient performance because the psychosexual evaluation did not affect the length of Estrada's sentence. Estrada appeals.

II.

ANALYSIS

In order to prevail on an ineffective assistance of counsel claim, an applicant must demonstrate both that his attorney's performance was deficient, and that he was prejudiced thereby. *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 693 (1984); *Aragon v. State,* 114 Idaho 758, 760, 760 P.2d 1174, 1176 (1988); *Hassett v. State,* 127 Idaho 313, 316, 900 P.2d 221, 224 (Ct.App. 1995); *Davis v. State,* 116 Idaho 401, 406, 775 P.2d 1243, 1248 (Ct.App. 1989). To show deficient performance, a defendant must overcome the strong presumption that counsel's performance was adequate by demonstrating that counsel's representation did not meet objective standards of competence demanded of attorneys in criminal cases. *Strickland,* 466 U.S. at 687, 104 S.Ct. at 2054, 80 L.Ed.2d at 693; *Roman v. State,* 125 Idaho 644, 648-49, 873 P.2d 898, 902-03 (Ct.App. 1994). If a defendant succeeds in establishing that counsel's performance was deficient, he must also prove the prejudice element by showing that "there is a reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different." *Id.* at 649, 873 P.2d at 903.

Estrada argues on appeal that the district court erred in its finding of lack of prejudice from his defense attorney's deficient service. However, we must first address the State's argument that the district court erred in finding deficient performance in the first instance.

A. The Fifth Amendment Privilege Against Self-incrimination Applies in Psychosexual Evaluations Ordered by the Court for Sentencing Purposes

The State first argues that Estrada could not prove deficient performance by his defense counsel because a criminal defendant in a non-capital case has no Fifth Amendment privilege to refuse participation in a psychosexual evaluation that is conducted to provide information to the court for sentencing. This is an issue of first impression in Idaho. We conclude that the State's position is not well taken.

Our analysis begins with the seminal United States Supreme Court decision, *Estelle v. Smith,* 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981). Smith was charged with capital murder, and the trial court ordered a psychiatric examination to determine Smith's competency to stand trial. Smith was later tried by jury and convicted. At the sentencing phase, the state called the psychiatrist as a witness to establish Smith's future dangerousness, after which the death penalty was imposed. In subsequent federal habeas corpus proceedings, Smith asserted that use of the psychiatrist's testimony at the penalty phase violated Smith's Fifth Amendment privilege against compelled self-incrimination because Smith was not advised before the pretrial psychiatric examination that he had a right to remain silent and that any statement he

made could be used against him at a sentencing proceeding. The Supreme Court concluded that the privilege against self-incrimination extended to the sentencing phase, rejecting the state's argument that the Fifth Amendment privilege is irrelevant to the penalty phase because "incrimination is complete once guilt has been adjudicated." *Id.* at 462, 101 S.Ct. at 1868, 68 L.Ed.2d at 368. The Supreme Court stated:

> The Fifth Amendment, made applicable to the states through the Fourteenth Amendment, commands that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." The essence of this basic constitutional principle is "the requirement that the State which proposes to convict *and punish* an individual produce the evidence against him by the independent labor of its officers, not by the simple, cruel expedient of forcing it from his own lips." *Culombe v. Connecticut,* 367 U.S. 568, 581-82, [81 S.Ct. 1860, 1867, 6 L.Ed.2d 1037, 1045-46] (1961) (opinion announcing the judgment) (emphasis added). *See also Murphy v. Waterfront Comm'n,* 378 U.S. 52, 55, [84 S.Ct. 1594, 1596, 12 L.Ed.2d 678, 681-82] (1964); E. Griswold, The Fifth Amendment Today 7 (1955).

The Court has held that "the availability of the [Fifth Amendment] privilege does not turn upon the type of proceeding in which its protection is invoked, but upon the nature of the statement or admission and the exposure which it invites." *In re Gault,* 387 U.S. 1, 49, [87 S.Ct. 1428, 1455, 18 L.Ed.2d 527, 558] (1967). In this case, the ultimate penalty of death was a potential consequence of what respondent told the examining psychiatrist. Just as the Fifth Amendment prevents a criminal defendant from being made "'the deluded instrument of his own conviction,'"

Culombe v. Connecticut, supra, at 581, [81 S.Ct. at 1867, 6 L.Ed.2d at 1045-46], quoting 2 Hawkins, Pleas of the Crown 595 (8th ed. 1824), it protects him as well from being made the "deluded instrument" of his own execution.

We can discern no basis to distinguish between the guilt and penalty phases of respondent's capital murder trial so far as the protection of the Fifth Amendment privilege is concerned.

Id. at 462-63, 101 S.Ct. at 1873, 68 L.Ed.2d at 368-69 (footnote omitted).[1]

More recently, in a non-capital case, *Mitchell v. United States,* 526 U.S. 314, 119 S.Ct. 1307, 143 L.Ed.2d 424 (1999), the Supreme Court held that a guilty plea does not function as a waiver of the right to remain silent at sentencing. *Id.* at 321-25, 119 S.Ct. at 1311-13, 143 L.Ed.2d at 432-35. The Court observed that, according to the express language of the Fifth Amendment, the privilege against self-incrimination applied to "any criminal case," which included, as a matter of law and common sense, the sentencing hearing. *Id.* at 327, 119 S.Ct. at 1314, 143 L.Ed.2d at 436-37 The Court explained that until sentence has been imposed, a defendant may legitimately fear adverse consequences from further testimony. Therefore, the privilege applies until the sentence has been fixed and the judgment of conviction has become final. *Id.* at 325-27,

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[1] The Supreme Court also rejected the State's argument that the Fifth Amendment was not violated because Smith's statements were not used for the testimonial content of what was said. The Court held that because the psychiatrist's conclusions were based on Smith's statements and omissions, the privilege against self-incrimination was implicated. *Estelle,* 451 U.S. at 463-65, 101 S.Ct. at 1873-74, 68 L.Ed.2d at 369-71.

119 S.Ct. at 1313-14, 143 L.Ed.2d at 435-37. The Supreme Court also rejected an assertion that a trial court may draw an adverse inference from a defendant's silence in sentencing proceedings. The Court adhered, instead, to "[t]he normal rule . . . that no negative inference from the defendant's failure to testify is permitted." *Id.* at 327-28, 119 S.Ct. at 1314-15, 143 L.Ed.2d at 436-36. Thus, under *Estelle* and *Mitchell,* a criminal defendant's privilege against self-incrimination is not extinguished by a plea of guilty and continues until the sentence is fixed and the judgment is final.

The Idaho Supreme Court correctly anticipated *Mitchell* in *State v. Wilkins,* 125 Idaho 215, 868 P.2d 1231 (1994), where the Court held that the Fifth Amendment privilege protects a defendant against compelled testimony at the sentencing hearing in a non-capital case. Our Supreme Court held that a guilty plea waives the privilege against self-incrimination only for the limited purposes of establishing a factual basis for the plea and determining whether the plea is entered freely and voluntarily. *Id.* at 217-18, 868 P.2d at 1233-34. After the entry of a guilty plea, the Court said, a defendant has the right to remain silent at sentencing to the same extent as that afforded a defendant convicted at a trial. *Id.* at 218, 868 P.2d at 1234.

In Idaho, the privilege against self-incrimination through the sentencing phase is also protected by a statute, I.C. § 19-3003, which provides:

> A defendant in a criminal action or proceeding to which he is a party, is not, without his consent, a competent witness for or against himself. His neglect or refusal to give such consent shall not in any manner prejudice him nor be used against him on the trial or proceeding.

In *State v. Anderson,* 130 Idaho 765, 770, 947 P.2d 1013, 1018 (Ct.App.1997), we held that this statute applied at a sentencing hearing. *See also State v. Heffern,* 130 Idaho 946, 949, 950 P.2d 1285, 1288 (Ct.App.1997).

It is thus beyond dispute that a defendant at a sentencing hearing may invoke the privilege against self-incrimination and that no negative inference from the defendant's invocation of the privilege is permitted with regard to the sentence imposed.

The next question is whether a different result obtains where the proceeding involved is a court-ordered psychosexual evaluation conducted for the purpose of informing the court's sentencing decision. We conclude that the privilege may be asserted in this context as well. Although the Fifth Amendment states that a person shall not be "compelled in a criminal case to be a witness against himself," the United States Supreme Court has long held that the availability of the privilege does not turn upon the type of proceeding in which its protection is invoked, but rather upon the nature of the statement or admission and the exposure which it invites. *In re Gault,* 387 U.S. 1, 49, 87 S.Ct. 1428, 1455, 18 L.Ed.2d 527, 558 (1967). The privilege may, for example, be claimed in a civil or administrative proceeding, if the statement is or may be inculpatory. *Id.* It attaches also in interviews with probation officers, *Minnesota v. Murphy,* 465 U.S. 420, 426, 104 S.Ct. 1136, 1141-42, 79 L.Ed.2d 409, 418-19 (1984), and in presentence interviews, *Jones v. Cardwell,* 686 F.2d 754, 756 (9th Cir.1982); *Williams v. Chrans,* 945 F.2d 926, 951 (7th Cir.1991); *United States v. Oliveras,* 905 F.2d 623, 625-26 (2nd Cir.1990). In the context of a psychosexual evaluation, the risk of self-incrimination is obvious. First, as in the instant case, a sentencing court can use the

defendant's statements to the evaluator or the evaluator's conclusions, drawn from the defendant's statements, as a basis to impose a harsher sentence than might otherwise have been chosen. Second, a defendant's disclosures made under the evaluator's questioning may expose the defendant to additional criminal charges for other offenses.

. . . Our conclusion that a defendant is entitled to invoke the privilege against self-incrimination with respect to a court-ordered mental health assessment for use at sentencing is consistent with a comment by our Supreme Court, albeit in dicta, in *State v. Wood,* 132 Idaho 88, 100, 967 P.2d 702, 714 (1998). The Court there noted that if an evaluator had been appointed to prepare a psychological report for purposes of sentencing, counsel for the defendant "would have had the opportunity to advise his client of the possible uses of the information and of the privilege against self-incrimination." Additionally, in *State v. Odiaga,* 125 Idaho 384, 391, 871 P.2d 801, 808 (1994), the Idaho Supreme Court also implied, without directly holding, that in the absence of an insanity defense, an order granting a prosecution motion to compel a pretrial psychological evaluation would be violative of the Fifth Amendment. The few decisions that we have found from other jurisdictions addressing the issue have held that the privilege against self-incrimination entitles a defendant to refuse participation in a presentence psychosexual or mental health evaluation. *See State v. Diaz-Cardona,* 123 Wash.App. 477, 98 P.3d 136, 138 (2004); *Dzul v. State,* 118 Nev. 681, 56 P.3d 875, 877-78 (2002); and *Commonwealth v. M.G.,* 75 S.W.3d 714, 724 (Ky.Ct.App.2002).

We have been referred to no authority holding to the contrary. The State has cited two Idaho Supreme Court decisions, *State v. Griffin,* 122 Idaho 733, 838 P.2d 862

(1992), and *State v. Pizzuto,* 119 Idaho 742, 810 P.2d 680 (1991), for its contention "that routine presentence investigation activities do not implicate Fifth Amendment concerns." Upon examination, however, neither case supports the State's position. In *Griffin,* the defendant asserted that the trial court violated his right to due process and his right against self-incrimination by enhancing his sentence based upon Griffin's refusal to identify his drug suppliers during cross-examination at his trial. The Supreme Court never reached the self-incrimination issue, however, because it resolved the question of the trial court's alleged misuse of the defendant's reticence concerning his drug sources on other grounds. *Id.* at 738-40, 838 P.2d at 867 69,. The *Griffin* opinion does include a statement that "[r]ecently, this Court upheld the use of admissions . . . made to presentence investigators, in the face of claims that the statements . . . violated the defendant's right against self-incrimination." *Id.* at 737, 838 P.2d at 866. This comment does not suggest a view that defendants possess no privilege against self-incrimination in presentence investigation interviews, however, for a conclusion that a right has not been violated is not the equivalent of a conclusion that the right never existed.

In *Pizzuto,* our Supreme Court held that the trial court properly admitted testimony at the sentencing hearing concerning a presentence interview conducted years earlier in another state where the defendant had not been advised of his *Miranda* rights.[2] *Pizzuto,* 119 Idaho at

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[2] *See Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), which held that before subjecting an individual to custodial interrogation, law enforcement officers must warn the individual that he has a right to remain silent, that any statement he does make may

(Continued on following page)

759-60, 810 P.2d at 697-98. *Pizzuto* did not hold that the defendant possessed no right against self-incrimination that he could have invoked during the presentence interview. Rather, the issue in *Pizzuto* was whether such a right had been violated because the interviewer had not informed Pizzuto of it. Numerous decisions from other jurisdictions cited by the State also hold, as suggested in *Pizzuto,* that *Miranda* warnings are not required before a defendant may be subjected to a presentence interview. In fact, in a decision that inexplicably has not been cited by either party, *State v. Curless,* 137 Idaho 138, 44 P.3d 1193 (Ct.App.2002), we have already held that an individual is not entitled to *Miranda* warnings before submitting to a psychosexual evaluation for sentencing. *Id.* at 144, 44 P.3d at 1199. These cases do not answer our present query, however, for whether the privilege against self-incrimination attaches in a particular circumstance and whether *Miranda* warnings must be given are not the same issues. One may hold the privilege against self-incrimination in a circumstance where the State is not obligated, under *Miranda,* to notify the interviewee of this right. *See, e.g., Murphy,* 465 U.S. at 430-34, 104 S.Ct. at 1143-46, 79 L.Ed.2d at 421-24 (recognizing that the privilege could have been invoked in interview with probation officer but holding that *Miranda* was inapplicable because the interview was not a custodial interrogation); *United States v. Cortes,* 922 F.2d 123, 125-27 (2nd Cir.1990) (recognizing that defendant possessed Fifth Amendment right to remain silent in presentence interview but holding that *Miranda*-type warnings prior to the

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be used as evidence against him, and that he has the right to the presence of an attorney, retained or appointed.

interview were not required); *Dzul,* 56 P.3d at 879 (holding that "while the right against self-incrimination clearly attaches at a court-ordered presentence psychosexual evaluation, a defendant is not entitled to *Miranda* warnings prior to the evaluation").

Accordingly, we reject the State's contention that the right against self-incrimination does not attach in presentence psychosexual evaluations.

B. Estrada Is Not Entitled to Relief for Ineffective Assistance of Counsel on the Grounds That Counsel Failed to Advise Him of the Right Against Self-incrimination or to Object to Consideration of the Psychosexual Evaluation at Sentencing

Having determined that the Fifth Amendment privilege applied and could have been invoked by Estrada during the psychosexual evaluation, we must next address whether Estrada's defense counsel was derelict in neither advising Estrada that he could invoke the privilege to refuse participation in the psychosexual evaluation nor objecting to consideration of the evaluation at sentencing on the ground that it was obtained in violation of Estrada's privilege against self-incrimination. Estrada's claim of ineffective assistance of counsel is premised on the long-established principle that the right to representation by counsel afforded by the Sixth Amendment means a right to be represented by reasonably competent counsel in an adequate fashion. *Strickland,* 466 U.S. at 685, 104 S.Ct. at 2063, 80 L.Ed.2d at 691-92; *Aragon,* 114 Idaho at 760, 760 P.2d at 1176. *See also State v. Tucker,* 97 Idaho 4, 8, 539 P.2d 556, 560 (1975) (An accused is entitled to the reasonably competent assistance of a diligent, conscientious

advocate.). This right attaches at all "critical stages" of the prosecution. *Kirby v. Illinois*, 406 U.S. 682, 690, 92 S.Ct. 1877, 1882-83, 32 L.Ed.2d 411, 418 (1972); *Mempa v. Rhay*, 389 U.S. 128, 134, 88 S.Ct. 254, 256-57, 19 L.Ed.2d 336, 340 (1967). For any proceeding that is a critical stage, the defendant is entitled to have counsel present and participating. *Maine v. Moulton*, 474 U.S. 159, 170-76, 106 S.Ct. 477, 484-87, 88 L.Ed.2d 481, 492-96 (1985); *Coleman v. Alabama*, 399 U.S. 1, 7-11, 90 S.Ct. 1999, 2002-04, 26 L.Ed.2d 387, 395-98 (1970); *Hamilton v. Alabama*, 368 U.S. 52, 82 S.Ct. 157, 7 L.Ed.2d 114 (1961). Conversely, if the proceeding at issue is not a critical stage, "there can be no constitutional violation, no matter how deficient counsel's performance." *United States v. Benlian*, 63 F.3d 824, 827 (9th Cir.1995). *See also Wainwright v. Torna*, 455 U.S. 586, 587-88, 102 S.Ct. 1300, 1301-02, 71 L.Ed.2d 475, 477-78 (1982);

We have previously held that a psychosexual evaluation in a non-capital case is not a critical stage to which the Sixth Amendment to counsel attaches. *See Curless*, 137 Idaho at 144-45, 44 P.3d at 1199-1200. In *Curless* we adopted the rationale expressed by the Ninth Circuit Court of Appeals in *Baumann v. United States*, 692 F.2d 565 (9th Cir.1982) and *Hoffman v. Arave*, 236 F.3d 523 (9th Cir.2001), that the *Estelle* decision, concerning the use of a psychiatric evaluation to determine whether the death penalty should be imposed, should be read narrowly. *Curless*, 137 Idaho at 144-45, 44 P.3d at 1199-1200. Noting that in *Baumann* and *Hoffman* the Ninth Circuit held that the right to counsel did not apply to a routine presentence interview in a non-capital case, we concluded:

> The psychosexual evaluation in Curless's case was more akin to a presentence interview than

> the interview conducted to determine competency and future dangerousness in *Estelle*. The information provided in the evaluation allowed the district court to make a more informed, appropriate sentencing decision that best furthered the sentencing goals set forth in I.C. § 19-2521. In addition, we note that presentence investigations are usually conducted by state agents, while psychosexual evaluations are almost always conducted by neutral, third parties not employed by the state. Curless's case is not a capital case and did not involve a bifurcated jury proceeding. Following the rationale of the Ninth Circuit, we conclude that Curless's case is distinguishable from *Estelle* and, instead, more similar to the facts of *Baumann*. Therefore, we hold that Curless's psychosexual evaluation did not constitute a critical stage for Sixth Amendment purposes.

Curless, 137 Idaho at 145, 44 P.3d at 1200.[3] On that basis, we rejected Curless's claim that he received ineffective assistance of counsel when counsel failed to advise him of the possible uses of the psychosexual evaluation or of his privilege against self-incrimination.

Our analysis in *Curless* was perhaps truncated, for a conclusion that a psychosexual evaluation is not a critical

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[3] In addition to the Ninth Circuit, many other federal circuit courts have held that a presentence interview does not constitute a critical stage in the adversary proceedings and that the Sixth Amendment right to counsel therefore does not attach. *See United States v. Washington*, 11 F.3d 1510, 1517 (10th Cir.1993); *United States v. Bounds*, 985 F.2d 188, 194 (5th Cir.1993); *United States v. Tisdale*, 952 F.2d 934, 940 (6th Cir.1992); *United States v. Johnson*, 935 F.2d 47, 50 (4th Cir.1991); *United States v. Jackson*, 886 F.2d 838, 844-45 (7th Cir.1989). *But see, contra, State v. Bankes*, 114 Wash.App. 280, 57 P.3d 284, 289 (2002).

stage of the proceedings at which a defendant is entitled to the *presence* of counsel does not necessarily compel a conclusion that a defendant is not entitled to competent *advice* about the evaluation, before it occurs, from the attorney representing him in the sentencing proceedings. In *Curless,* we followed the reasoning in *Baumann,* where the Ninth Circuit held that because the presentence interview was not a critical stage of the proceedings, any denial of the advice of counsel in making the decision whether to submit to the interview "was constitutionally insignificant." *Baumann,* 692 F.2d at 578.

Whether the same analytical jump must follow from our conclusion that a section 18-8316 psychosexual evaluation is not a critical stage of the prosecution is not determinative of Estrada's claim, however, for even if Estrada's right to effective assistance encompassed a right to competent advice in advance of the psychosexual evaluation (particularly in light of Estrada's expressions of reluctance to participate), his counsel cannot be deemed deficient. The Sixth Amendment entitles criminal defendants to reasonably competent counsel, but not to perfect or prescient counsel. *Nelson v. Estelle,* 642 F.2d 903, 908 (5th Cir.1981) ("[C]ounsel is normally not expected to foresee future new developments in the law. . . ."); *Brown v. United States,* 311 F.3d 875, 878 (8th Cir.2002) (holding that counsel's performance was not deficient for failing to predict future developments in the law). Until our decision today, no decision of the Idaho appellate courts or of the United States Supreme Court had held that a defendant may invoke the privilege against self-incrimination in a court-ordered mental health evaluation conducted for sentencing in a non-capital case. Our decision in *Curless* expressly left this question unresolved. *Curless,* 137 Idaho

at 143, 44 P.3d at 1198. Thus, when Estrada's evaluation occurred, the attachment of the privilege was not clear; indeed, the State has argued vigorously in this appeal that it did not exist. In their briefs on this appeal, neither party has cited a case directly addressing this issue, and our own research has yielded few authorities directly on point from other jurisdictions. Therefore, we hold that, as a matter of law, the failure of Estrada's counsel to advise Estrada concerning the privilege against self-incrimination as it applied to the psychosexual evaluation, and counsel's failure to file a suppression motion for alleged violation of the privilege, did not constitute incompetent representation.

We also conclude that Estrada's counsel cannot be faulted for failing to move to suppress the psychosexual evaluation report because such a motion would not have been meritorious. Estrada's claim that his counsel should have filed a suppression motion is based upon the premise that Estrada was compelled to disclose information during the evaluation in violation of the Fifth Amendment privilege. If there was no such violation, counsel could not be deficient for omitting to file an unmeritorious motion to suppress. *See State v. Hairston,* 133 Idaho 496, 512, 988 P.2d 1170, 1186 (1999); *Hassett v. State,* 127 Idaho 313, 316, 900 P.2d 221, 224 (Ct.App.1995); *Huck v. State,* 124 Idaho 155, 158-59, 857 P.2d 634, 637-38 (Ct.App.1993).

As we noted in *Curless,* the Fifth Amendment prohibits only compelled self-incrimination; it does not preclude the use in court of self-incriminatory statements that were made voluntarily. *Curless,* 137 Idaho at 143, 44 P.3d at 1198. Therefore, a witness ordinarily must invoke the privilege in order to claim its protection. *Id.* An exception applies, however, where the witness knows that an assertion of the

privilege would be penalized, or a penalty is threatened, so that a free choice to remain silent is foreclosed and the witness is compelled to give incriminating testimony. *Murphy,* 465 U.S. at 434, 104 S.Ct. at 1145-46, 79 L.Ed.2d at 423-24; *Curless,* 137 Idaho at 143, 44 P.3d at 1198.[4] That is, the State may not induce a witness to forego the Fifth Amendment privilege by threatening to impose sanctions capable of forcing the self-incrimination that the amendment forbids. *Murphy,* 465 U.S. at 434, 104 S.Ct. at 1145-56, 79 L.Ed.2d at 423-24.

In *Murphy,* the United States Supreme Court made clear that it is the threat of punishment for invoking the privilege, not the mere requirement that a witness appear and give testimony, that constitutes a Fifth Amendment violation. *Id.* at 435, 104 S.Ct. at 1146, 79 L.Ed.2d at 424-25. The defendant in *Murphy* made incriminating statements in response to a probation officer's queries. The defendant argued his statements were compelled because he feared that his probation would be revoked if he failed to answer, but he did not claim that he was expressly told that an assertion of the privilege during the interview would result in revocation of his probation or other penalty. The Supreme Court held that the defendant had not demonstrated that his statements to the probation officer

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[4] Another exception to the general rule that a witness must claim the privilege in order to enjoy its protections applies to an individual who is subjected to custodial interrogation without having received *Miranda* warnings. *See Miranda,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694. However, in *Curless,* 137 Idaho at 144, 44 P.3d at 1199, we held that an interview by a court-appointed psychosexual evaluator did not constitute interrogation of the type to which *Miranda* applies. Estrada does not argue on appeal that his statements to the evaluator were suppressible for violation of his *Miranda* rights.

were given under compulsion even though he had been informed that he was required to be truthful with his probation officer in all matters and that failure to do so could result in revocation of probation. The Supreme Court said that the mere requirement to appear and be truthful

> . . . did not in itself convert Murphy's otherwise voluntary statements into compelled ones. In that respect, Murphy was in no better position than the ordinary witness at a trial or before a grand jury who is subpoenaed, sworn to tell the truth, and obligated to answer on the pain of contempt, unless he invokes the privilege and shows that he faces a realistic threat of self-incrimination. The answers of such a witness to questions put to him are not compelled within the meaning of the Fifth Amendment unless the witness is required to answer over his valid claim of the privilege.

Id. at 427, 104 S.Ct. at 1142, 79 L.Ed.2d at 419. The Court therefore rejected Murphy's claim, concluding that Minnesota did not attempt to take the "extra, impermissible step" of threatening punishment for invocation of the privilege. *Id.* at 436-39, 104 S.Ct. at 1147-49, 79 L.Ed.2d at 425-27.

Here, the record shows that after the district court ordered a psychosexual evaluation for use at sentencing, Estrada initially balked at participating in the evaluation. He wrote a letter to the district court complaining that the evaluation was a tactic to waste time and delay his sentencing. Defense counsel received a copy of the letter and responded with a letter to Estrada stating that the evaluation was not a delay tactic but, rather, that the district court had ordered the evaluation and unless the court changed its mind, the evaluation had to be completed prior

to sentencing. A short time later, the evaluator wrote to defense counsel that the evaluator was unable to complete the evaluation in a timely manner because Estrada had not completed written assessments and other necessary materials. Defense counsel then wrote another letter to Estrada, saying:

> I received a letter from [the evaluator] stating that you are not cooperating with your evaluation. I understand that you do not want to participate in the evaluation. The evaluation was, however, ordered by Judge Higer. We would not want the judge to consider your lack of cooperation to mean that you are not willing to comply with court orders. Please consider cooperating with [the evaluator] during the evaluation process.

Estrada argues that in these circumstances, he was threatened with a penalty if he were to invoke his privilege against self-incrimination.

We are unconvinced. The district court's initial order that a psychosexual evaluation of Estrada be prepared for use at sentencing does not constitute a threat of penalty for a later invocation of the privilege against self-incrimination any more than does a subpoena ordering a witness to appear and testify at a trial. There is no evidence that the district court either expressly or by implication asserted that invocation of the privilege would be penalized. *Compare Wilkins,* 125 Idaho at 217-18, 868 P.2d at 1233-34 (district court erroneously denied a defense motion seeking, on the basis of the privilege against self-incrimination, to preclude the prosecution from calling the defendant as a witness at sentencing); *Anderson,* 130 Idaho at 769-70, 947 P.2d at 1017-18 (trial court erroneously

forced defendant to testify at sentencing by threatening to use his silence as an aggravating factor); *Heffern,* 130 Idaho at 949-50, 950 P.2d at 1288-89 (district court erroneously penalized defendant for asserting privilege against self-incrimination at sentencing).

Nor did the evaluator's letter threaten a penalty for non-cooperation. The evaluator's comments amounted to an explanation that the evaluation could not be completed until Estrada provided the necessary information. This is nearly identical to the situation in *Curless,* where we held that a statement in a psychosexual evaluation agreement indicating that the defendant's failure to fully participate would jeopardize the evaluation process and possibly result in an inability to render an evaluation was not a threat of penalty but only an explanation of practical consequences of failure to participate. *Curless,* 137 Idaho at 144, 44 P.3d at 1199. Finally, statements by defense counsel urging Estrada to cooperate did not amount to a threat of penalty, for to excuse one's failure to invoke the Fifth Amendment privilege, the penalty or threat must come from the State. *Colorado v. Connelly,* 479 U.S. 157, 170, 107 S.Ct. 515, 523-24, 93 L.Ed.2d 473, 486-87 (1986); *United States v. White,* 846 F.2d 678, 688-89 (11th Cir.1988); *Luna v. Massachusetts,* 354 F.3d 108, 111 (1st Cir.2004).

Thus, there is no evidence in the record that Estrada was threatened with a penalty if he were to assert the privilege against self-incrimination during interviews with the evaluator. Accordingly, Estrada waived the privilege against self-incrimination by failing to invoke it before or during the psychosexual evaluation, and statements he made during the evaluation therefore were not suppressible for violation of the privilege. It follows that his attorney did

not provide deficient representation by failing to bring a suppression motion.

III.

CONCLUSION

Estrada has not shown that his lawyer provided inadequate representation either in failing to advise Estrada that he could invoke his privilege against self-incrimination to prevent the psychosexual evaluation or in failing to move for suppression of the evaluation report. Therefore, we hold that the district court correctly denied Estrada's petition for post-conviction relief, albeit on grounds different than those expressed by the district court.

The district court's order denying post-conviction relief is affirmed.

Chief Judge PERRY and Judge GUTIERREZ concur.

IN THE DISTRICT COURT OF
THE FIFTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR
THE COUNTY OF TWIN FALLS

KRISPEN DEAN ESTRADA, Petitioner, vs. STATE OF IDAHO, Respondent.	Case No. CV 03-3664 **MEMORANDUM DECISION AND ORDER DENYING PETITION FOR POST-CONVICTION RELIEF**

This matter is before the court on a Petition for Post-Conviction Relief. On February 27, 2004, a hearing was held on the matter pursuant to Idaho Code Section 19-4907. Mr. Dennis Benjamin appeared on behalf of the Petitioner. Mr. Kenneth Robins represented the State of Idaho. The Court has reviewed the materials submitted by both parties, received testimony, researched the applicable law, and heard oral argument.

FACTS

On February 26, 2001, Krispen Dean Estrada was charged in Twin Falls County Case CR-01-0544 with one count of Rape and one count of Kidnapping in the Second Degree.[1] Pursuant to a plea agreement, Estrada entered a plea of guilty to the Rape charge on May 7, 2001. At that change of plea hearing, the court advised Estrada that in entering a guilty plea, he was waiving his constitutional

[1] On this same date, Mr. Wells Ashby, who was then a Twin Falls County Public Defender, was appointed to represent the Petitioner.

right against self-incrimination.[2] The court also reviewed with Estrada his responses to questions contained in two documents, the *Acceptance of Guilty Plea Questionnaire* and *Acknowledgement and Disclosure of Consequences of a Plea of Not Guilty and a Plea of Guilty*. In these documents, Estrada acknowledged in writing his understanding that he was waiving his right against self-incrimination.[3] After accepting Estrada's plea, the court ordered him to undergo a psychosexual evaluation pursuant to *Idaho Code §18-8316*. Mr. Larry Gold, a Licensed Professional Counselor, was selected to perform this evaluation.

On June 26, 2001, Estrada wrote a letter to Judge Higer complaining that he thought the psychosexual evaluation was nothing but an unnecessary ploy to delay his sentencing. On June 27, 2001, Mr. Ashby responded to Estrada's letter with a letter of his own. In this letter, Ashby advised Estrada that the psychosexual evaluation was a court-ordered evaluation that had to be completed before sentencing and was not a delay tactic. Based on Ashby's letter, Estrada decided to participate in the evaluation. There is no dispute about the fact that Ashby did not advise Estrada of his right against self-incrimination vis-à-vis the evaluation.

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[2] The Hon. Nathan W. Higer, District Judge, now retired was the presiding judge in the underlying case.

[3] Estrada reviewed these forms with Mr. Ashby prior to the change of plea hearing. The court notes that the Idaho Supreme Court has held that when a defendant enters a guilty plea, he waives his privilege against self-incrimination only "to permit the trial court to interrogate [him] to determine the voluntariness of [his] plea and to establish a factual basis for accepting it." *State v. Wilkins*, 125 Idaho 215, 217-18, 868 P.2d 1231, 1233-34 (1994).

The evaluation took place in late June and early July of 2001 over the course of two meetings between Gold and Estrada in the education room at the Twin Falls County Jail. During the first meeting, Gold administered an I.Q. test and provided Estrada with numerous forms to complete before the second meeting. At the time of the second meeting, Estrada had not completed of these forms.

On July 5, 2001, Gold sent a letter to Mr. Ashby advising him of Estrada's failure to complete the forms. On July 10, 2001, Ashby sent another letter to Estrada advising him to cooperate with Gold since the evaluation was court-ordered. The letter further stated that "[w]e would not want the judge to consider your lack of cooperation to mean that you are not willing to comply with court orders." Estrada eventually completed the forms and returned them to Gold. During the course of the evaluation, Gold never advised Estrada of his right against self-incrimination.

Gold's evaluation report was filed with the court on August 3, 2001. Copies were also provided to Mr. Ashby, the Twin Falls County Prosecuting Attorney's office, and the Idaho Department of Corrections. On August 6, 2001, Estrada appeared before Judge Higer and was sentenced to serve twenty-five (25) years to life in the state penitentiary. Following an unsuccessful appeal to the Idaho Supreme Court, Estrada filed a Verified Petition for Post-Conviction Relief ("Petition").

In the Petition, Estrada claims that Mr. Ashby provided ineffective assistance of counsel. Specifically, he alleges that Ashby should have: (1) advised Estrada that he still retained his constitutional right against self-incrimination even after entering a guilty plea and he was

not required to participate in the psychosexual evaluation; (2) informed Estrada that he was entitled to a confidential defense evaluation; (3) moved to suppress the report of the evaluation prior to its consideration by the court; and (4) made a sentencing recommendation instead of leaving the sentence in the court's discretion.

That portion of the claim relating to the sentencing recommendation issue was summarily dismissed by the Honorable Daniel C. Hurlbutt, District Judge, on October 17, 2003. Therefore, the psychosexual evaluation issues are all that remain to be addressed.

ANALYSIS

An application for post-conviction relief initiates a proceeding that is civil in nature. *Hassett v. State*, 127 Idaho 313, 315, 900 P.2d 221, 223 (Ct. App. 1995). Therefore, a petitioner must prove by a preponderance of the evidence the truth of the allegations upon which the application is based. *Id.*

"A defendant seeking relief for ineffective assistance of counsel must show both that the attorney's representation was deficient and that the defendant was prejudiced thereby." *State v. Mayer*, 2004 WL 67511, *5 (Idaho App.) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064 (1984)). "This requires a showing that the defense attorney made errors so serious that the attorney was not functioning as the 'counsel' guaranteed to the defendant by the Sixth Amendment." *Id.* In determining whether there was deficient performance "[c]ounsel's performance is measured by an objective standard of reasonableness." *State v. Hairston*, 133 Idaho 496, 511, 988 P.2d 1170, 1185 (1999) (citing *Aragon v. State*, 114 Idaho

758, 760, 760 P.2d 1174, 1176 (1988)). "There is a 'strong presumption that counsel's performance falls within the wide range of professional assistance.'" *Id.* To show prejudice, it must be proven "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

I. Mr. Ashby's Performance was Deficient.

In *State v. Wood*, 132 Idaho 88, 967 P.2d 702 (1998), the Idaho Supreme Court held that a defense attorney's failure to object to the inclusion of a psychological evaluation in a presentence investigation report (PSI) constituted ineffective assistance of counsel. 132 Idaho at 101, 967 P.2d at 716. In *Wood*, the defendant pled guilty to first-degree murder, first-degree kidnapping, and two counts of rape. After the district court accepted Wood's plea, it ordered a presentence investigation and ordered that the report of the defense's psychiatric expert be included in the PSI. Defense counsel did not object to the inclusion of the psychiatric report in the PSI.

Relying on I.R.E. 503(b)(2) (the psychotherapist-patient privilege), the Court in *Wood* found the defense attorney's performance to be deficient. The Court stated:

> Whittier did not object to the inclusion of Dr. Gregory's report as part of the presentence report. Although there are instances in which defense counsel properly would not object, knowing that [the] contents of the psychiatric report are favorable to the defendant, in this case the report had not been written, and Whittier did not know

> whether it would be favorable or unfavorable . . . [T]he failure to object fell below an objective standard of reasonableness.

132 Idaho at 101, 967 P.2d at 716.

Unlike the situation presented in *Wood*, the psychosexual evaluation ordered by Judge Higer was performed by an expert who had not been retained by Estrada's defense. Also, Estrada had not met with Mr. Gold before the psychosexual evaluation was ordered. Even so, the following language from *Wood* cannot be ignored:

> If a psychiatrist or psychologist had been appointed by the court for purposes of a presentence investigation, counsel for Wood would have had the opportunity to advise his client of the possible uses of the information *and of the privilege against self-incrimination*.

132 Idaho at 100, 967 P.2d at 715 (*emphasis* added).

This language clearly shows that a defendant who has pled guilty should be advised of his Fifth Amendment right against self-incrimination before he submits to any type of psychological evaluation. Although *Wood* was a capital case, this court believes that this requirement applies to non-capital cases as well. *See Mitchell v. United States*, 526 U.S. 314, 119 S.Ct. 1307 (1999).

Mr. Ashby did not advise Estrada of his right against self-incrimination prior to the psychosexual evaluation. He also did not object to the evaluation prior to its consideration by the court. While this court has difficulty concluding that "but for" counsel's deficient performance, the result of the proceeding would have been different," *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068, the court is nevertheless

bound by the Idaho Supreme Court's statement in *Wood* that these oversights amount to deficient performance.

These omissions caused Ashby's performance to fall below an objective standard of reasonableness as defined in *Wood*. Also, since the psychosexual evaluation contained information concerning Estrada's "future dangerousness," Ashby's performance was deficient as a result of his failure to request a confidential defense evaluation or to inform Estrada of his right to a separate defense evaluation. *Cf. Ake v. Oklahoma,* 470 U.S. 68, 83-87, 105 S.Ct. 1087, 1096-1098 (1985).

II. Mr. Ashby's Deficient Performance did not prejudice Estrada.

As stated above, in order to satisfy the prejudice prong of the ineffective assistance of counsel test, the Petitioner must show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland, supra.* This issue is a difficult one for Estrada, given that Judge Higer is now retired and this court is left to speculate about how Judge Higer might have reacted had Estrada elected to exercise his right to remain silent by refusing to submit to the evaluation.

The court is certainly aware of the generalized statement of the law that the sentencing court cannot use the defendant's assertion of his right to remain silent against him at sentencing. *See Mitchell v. United States* 526 U.S. 314, 119 S.Ct. 1307 (1999); *State v. Heffern*, 130 Idaho 946, 949-50, 950 P.2d 1285, 1288-89 (Ct. App. 1997). In *Mitchell*, the United States Supreme Court held that (1) a guilty plea does not waive the Fifth Amendment privilege

against self-incrimination in the sentencing phase of a case in the federal criminal system; and (2) a trial court may not draw an adverse inference from the defendant's silence in determining facts about the crime which bear upon the severity of the sentence. 526 U.S. at pp. 316-317. However, the Court expressly noted that "[w]hether silence bears upon the determination of a lack of remorse, or upon acceptance of responsibility for purposes of the downward adjustment provided in . . . the United States Sentencing Guidelines (1998), is a separate question. It is not before us, and we express no view on it." *Id.* at p.330.

Against this backdrop is Idaho's statutory mandate that, when ordered by the court, a person such as Estrada must submit to a psychosexual evaluation. *See Idaho Code §18-8316.* Thus, pursuant to the statute, the Defendant was required to obtain the evaluation when ordered by the court. Such an evaluation must include an analysis of "whether it is probable that the offender is a violent sexual predator." *Id.* This court believes that this statutory mandate authorized Judge Higer, or any sentencing court to consider Estrada's lack of cooperation as a minimization of his culpability for the offense for which he was being sentenced. Likewise Judge Higer could appropriately consider Estrada, in the absence of proof to the contrary, a "violent sexual predator."

Idaho's courts have held that a trial court may properly consider a defendant's refusal to admit factual guilt to the underlying offense as a factor in sentencing. *See, e.g., State v. Drennon,* 126 Idaho 346, 355, 883 P.2d 704, 713 (Ct.App.1994) (defendant's minimization of his culpability with respect to the commission of a lewd and lascivious act with his young daughter, following a jury conviction for the same, was a proper sentencing consideration); *State v.*

Lawrence, 112 Idaho 149, 157-58, 730 P.2d 1069, 1077-78 (Ct.App.1986) (defendant's refusal to admit guilt following a jury conviction for lewd and lascivious conduct with minors is a relevant sentencing consideration insofar as rehabilitation is concerned); *Cf. State v Jones*, 129 Idaho 471, 926 P.2d 1318 (Ct.App.1996) (in revoking probation the district court properly considered defendant's refusal to admit, in counseling, to responsibility for the offense to which he entered an *Alford* plea *and* other related but dismissed charges, where probation was expressly contingent upon the defendant's successful completion of sex offender treatment which included a requirement of full disclosure). Based upon this line of authority, this court concludes that Judge Higer would have been well within his authority in considering Estrada's refusal to cooperate with his psychosexual evaluation as bearing upon Estrada's remorse, his amenability to treatment, and/or his risk to the community.

This court is left to determine whether, had Estrada remained silent, the court would have simply considered him as not amenable to treatment at all, making a life sentence with significant fixed time a high probability. Clearly Judge Higer relied on the evaluation report in determining Estrada's sentence. *See Transcript of Sentencing Hearing*, p. 54; ll. 15-25, p.55; ll. 1-25. But he did so in concluding, pursuant to Idaho Code §18-8316, that Mr. Estrada was at a high level of risk for reoffense, as the statute required him to do.

The Nevada Supreme Court recently faced the issue of whether the imposition of a substantial prison sentence for assertion of the right to remain silent in refusing to cooperate with a psychosexual evaluation amounted to a violation of *Mitchell*. The court held that Nevada's

sentencing scheme, which, like Idaho's, has a mandatory requirement for a psychosexual evaluation, does not violate a defendant's Fifth Amendment rights:

> 'The Fifth Amendment does not insulate a defendant from all 'difficult choices' that are presented during the course of criminal proceedings, or even from all choices that burden the exercise or encourage waiver of the Fifth Amendment's right against self-incrimination.' Further, presenting a defendant with the choice between admitting responsibility with a greater chance of receiving a favorable psychosexual evaluation or denying responsibility with a greater risk of receiving an unfavorable evaluation is consistent with the historical practice and understanding that a sentence imposed upon a defendant may be shorter if rehabilitation looks more certain and that confession and contrition are the first steps along the road to rehabilitation. Rehabilitation is a key factor in extending leniency to convicted offenders.

Dzul v. State, 118 Nev. 681, 56 P.3d 875, 883 (2002) (footnotes omitted) (quoting *U.S. v. Frazier*, 971 F.2d 1076, 1080 (4th Cir. 1992)).

This court believes that Idaho law is identical, and that the result for Mr. Estrada would be the same. Certainly had he been informed of his right to remain silent, Estrada would have faced the Hobson's choice of (1) remaining silent while risking a harsher sentence for failure to cooperate, or (2) cooperating and encountering the risk that the evaluator might find him to be an unreasonable risk for reoffense. *Cf. State v. Heffern*, 130 Idaho 946, 949-50, 950 P.2d 1285, 1288-89 (Ct. App. 1997). The determination this court must make is whether, had

Estrada been advised and exercised his right, or had he obtained an independent evaluation, there is a "reasonable probability" that Judge Higer would have imposed a lighter sentence. This court cannot reach that conclusion here.

As a private practitioner, experience with Judge Higer, (or for that matter, every other District Judge in this district), is that he took a dim view of individuals who refused to cooperate with sexual offender evaluation or treatment. Mr. Ashby was obviously aware of the same experience as evidenced by his letter counseling Estrada that cooperation would be in his own best interest. As Ashby wrote: "The evaluation was however, ordered by [J]udge Higer. We would not want the judge to consider your lack of cooperation to mean that you are not willing to comply with court orders. Please consider cooperating with Mr. Gold during the evaluation process." *Petitioner's Exhibit 5*. Thus, Mr. Ashby's advice was to cooperate, rather than stonewall, in the hope that the result of the evaluation would be favorable for Estrada.

As we now know in pure hindsight, the evaluation was not "helpful"; however, this court cannot find that had Estrada not cooperated, or had he obtained another evaluation[4], there would be a "reasonable probability," of an appreciably lighter sentence. Rather, in this court's view the greater likelihood is that a refusal to cooperate in the evaluation would have resulted in an even more severe

---

[4] The court is left to speculate as to what an independent, "private" evaluation might have shown here. I cannot find, based upon "reasonable probability," that such an evaluation would have been in any respect more beneficial for Estrada than the one prepared by Larry Gold, an independent, court appointed psychologist.

sentence. This is not to say that Judge Higer would have unconstitutionally used Estrada's election to exercise his constitutional right against him; rather, it is a practical recognition that the failure to cooperate would have resulted in the appropriate application of Judge Higer's sentencing discretion to insure that a violent offender was not unleashed upon society in the absence of psychological data which reflected that he was not a serious risk for reoffense.

The facts of this case evince a horrendous and brutal crime – the forcible rape of a woman in front of her children. Estrada acknowledged these facts in the PSI (Respondent's Exhibit B). According to Estrada's own statement in the PSI, after the rape Estrada wanted to have a shoot-out with the police. The SWAT team was called and fortunately Estrada injured no one else on the night in question. Mr. Estrada presented for sentencing with those facts already against him. He also presented with a prior felony conviction for burglary, along with a significant number of misdemeanor convictions. At the time of his arrest, Estrada was facing prosecution in two cases for felony possession of methamphetamine in Malheur County, Oregon.

Based upon these factors, and the protection and good order of society that was required in this case, this court cannot conclude that Mr. Ashby's deficient performance materially affected the sentence ultimately imposed upon Estrada. Estrada has failed to satisfy the second of the two equally important prongs required by *Strickland*; therefore, the Petition is hereby DISMISSED.

CONCLUSION

For the reasons discussed above, Estrada was not denied effective assistance of counsel. Therefore, his Petition for Post-Conviction Relief is hereby **DENIED**.

THE COURT ADOPTS THE ABOVE AS ITS FINDINGS OF FACT AND CONCLUSIONS OF LAW.

Dated this 25th day of March 2004.

\s\
G. RICHARD BEVAN
District Judge

In the Supreme Court of the State of Idaho

KRISPEN ESTRADA, Petitioner-Appellant, v. STATE OF IDAHO, Respondent.	) ORDER DENYING PETITION FOR REHEARING)) NO. 32755)) Ref. No. 07RH-2)

The Respondent having filed a PETITION FOR REHEARING on December 14, 2006 and supporting BRIEF on January 4, 2007 of the court's Opinion released November 24, 2006; therefore, after due consideration,

IT IS HEREBY ORDERED that Respondent's PETITION FOR REHEARING be, and hereby is, DENIED.

DATED this 22 day of January 2007.

By Order of the Supreme Court

/s/ Stephen Kenyon
Stephen W. Kenyon, Clerk

cc: Counsel of Record
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No. 06-1410

Supreme Court, U.S.
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In The

Supreme Court of the United States

STATE OF IDAHO,

Petitioner,

v.

KRISPEN ESTRADA,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Idaho

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Should the United States Supreme Court deny the State of Idaho's Petition for Writ of Certiorari because the question presented asks this Court to render an advisory opinion deciding a constitutional question?

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OPINIONS BELOW

The opinions of the Idaho District Court, Idaho Court of Appeals, and Supreme Court of the State of Idaho appear in the Petitioner's Appendix pages 1-48. In addition, the opinion of the Supreme Court of the State of Idaho appears at 143 Idaho 558, 149 P.3d 833 (Idaho 2006).

JURISDICTION

The Petitioner has invoked the jurisdiction of the Court under Title 28, United States Code, Section 1257(a) which authorizes, in part, this Court's review of final judgments or decrees rendered by the highest court of a state in which a decision could be had and in which any right, privilege, or immunity is specially set up or claimed under the Constitution of the United States.

CONSTITUTIONAL PROVISION INVOLVED

The only constitutional provision asserted by the Petitioner here involved is that portion of the Fifth Amendment of the United States Constitution which provides, "No person . . . shall be compelled in any criminal case to be a witness against himself. . . ." U.S. CONST. amend. V.

STATEMENT OF THE CASE

In the criminal action which underlies this post-conviction action, Mr. Estrada pled guilty to a single

charge of rape. (R., p.6.) The district court ordered Mr. Estrada to undergo a psychosexual evaluation. (State's Request for Judicial Notice During Post-Conviction Proceedings, p.70.) Prior to completing the evaluation, Mr. Estrada wrote to the district court asking to be sentenced and indicating that he did not wish to wait for a psychosexual evaluation to be prepared. (Petitioner's Exhibit, No.2.) Mr. Estrada's trial counsel then wrote to Mr. Estrada stating, "The court ordered a psycho-sexual evaluation and it has not been completed. Unless Judge Higer decides that he no longer needs the report, it must be completed before you are sentenced." (Petitioner's Exhibit, No.3.) Trial counsel subsequently received a letter from the evaluator which indicated that Mr. Estrada was reluctant to participate in the psychosexual evaluation and had not completed "assessments and information gathering material." (Petitioner's Exhibit, No.4.) Counsel then wrote to Mr. Estrada stating,

> I understand that you do not want to participate in the evaluation. The evaluation was however, ordered by Judge Higer. We would not want the judge to consider your lack of cooperation to mean that you are not willing to comply with court orders. Please consider cooperating with [the evaluator] during the evaluation process.

(Petitioner's Exhibit, No.5.)

Mr. Estrada relented, participated in the process, and a report was ultimately created. (Petitioner's Exhibit, No.G.) During Mr. Estrada's sentencing hearing, the district court relied extensively upon the evaluation. (R., pp.54-55.) The sentencing court found that the evaluation gave it "little hope that rehabilitation is an appropriate matter for me to consider. . . ." (R., pp.54-55.) In addition,

the court noted that the evaluator's conclusion that "a pattern of violence is well established" wasn't based upon a record of violence, but rather upon the testing that was done. (R., p.73.) The sentencing court imposed a unified sentence of life, with twenty-five years to be served before consideration for parole. (R., p.76.)

In this post-conviction action, Mr. Estrada asserted, in part, that he received ineffective assistance of counsel when his attorney failed to inform him that he was not required to submit to a psychosexual evaluation or that he could assert his right against self-incrimination, and when he permitted Mr. Estrada to participate in the evaluation without knowledge of what the results would be. (R., pp.7, 90.) He asserted that he was prejudiced because there was a reasonable probability that he would have received a more favorable sentence had the sentencing court not considered the evaluation. (R., pp.11, 91.)

The post-conviction court found that Mr. Estrada's counsel had rendered deficient performance, but Mr. Estrada did not suffer prejudice as a result. (Pet. App. pp.40-47.) The court held that had Mr. Estrada invoked his right against self-incrimination an adverse inference "bearing upon remorse, his amenability to treatment, and/or his risk to the community" could have been taken without violating the Fifth Amendment. (Pet. App. pp.42-44.) The court further found that, pursuant to Idaho's violent sexual predator statutes, an adverse presumption of dangerousness would have been taken by the sentencing court, and that a sentencing court could, under Idaho sentencing law, consider the invocation of the right against self-incrimination as a minimization of culpability for the crime. (Pet. App. pp.43-47.) Finding that the attorney's deficient performance did not impact the sentence imposed, the

district court denied Mr. Estrada post-conviction relief. (Pet. App. p.47.)

On appeal, Mr. Estrada asserted that his attorney had acted deficiently and that he had a Fifth Amendment right not to incriminate himself during the sentencing process. (Appellant's Brief, pp.8-11.) In addition, he asserted that he was prejudiced by his attorney's deficient performance because "he was forced to participate in a psychosexual evaluation that was later used against him in sentencing, and because he would have received a lesser sentence had the report not been considered." (Appellant's Brief, pp.12-13; Appellant's Reply Brief, pp.30-35.) In addition, Mr. Estrada asserted that there were statutory sentencing factors for which the State bore the burden and applying any presumptions that these had been met would violate his Fourteenth Amendment right to due process. (Appellant's Brief, pp.16-22.)

In response to Mr. Estrada's assertions, the State argued that Mr. Estrada's trial counsel did not render deficient performance because "Fifth Amendment protections do not extend to the presentence psychosexual evaluation the trial court considered . . . ." (Respondent's Brief, pp.9-16.) The State also argued that, pursuant to state sentencing law, it did not have a burden to prove anything beyond the facts of the crime to justify the sentence imposed and, had Mr. Estrada not participated in the evaluation, the district court could have taken adverse inferences from his silence without violating his Fifth Amendment rights. (Respondent's Brief, pp.14-22.) Finally, the State alleged that the Fourteenth Amendment due process rights asserted by Mr. Estrada were "irrelevant" because the statements made by Mr. Estrada "did not act

as a jury trial waiver or effect [sic] a guilty plea." (Respondent's Brief, pp.19-23.)

The Idaho Court of Appeals determined that Mr. Estrada did have a Fifth Amendment right against self-incrimination which could be asserted during a sentencing hearing. (Pet. App. pp.18-21.) The court further recognized that Idaho Code section 19-3003 applied to sentencing proceedings and prevented the taking of adverse inferences from a defendant's assertion of a right to silence. (Pet. App. pp.21-22.) The court also found that these statutory and constitutional rights could likewise be asserted during a presentence mental health evaluation. (Pet. App. pp.22-26.) However, in the absence of a prior appellate opinion directly on point, the Court determined that it was not deficient performance for Mr. Estrada's trial attorney to fail to inform Mr. Estrada of the right as counsel could not have predicted the future development of the law. (Pet. App. pp.29-30.)

Mr. Estrada filed a Petition for Review and asked the Supreme Court of the State of Idaho to review the decision of the district court. This petition was granted as to the issues presented in the appeal. (Order Granting Petition for Review, filed February 21, 2006.)

On review, Mr. Estrada specifically asserted that in the absence of the psychosexual evaluation the State had failed to meet its burden under Idaho's sentencing criteria statute to justify the sentence actually imposed. (Appellant's Brief on Review, pp.34-39.) In addition, Mr. Estrada asserted that the application of any adverse presumptions violated due process and Idaho's sentencing criteria statute by shifting the burden of proof to the defendant. (Appellant's Brief on Review, pp.28-39.) He did assert

prejudice in regards to the utilization of information that was given in the absence of correct legal advice on the issue of the right against self-incrimination. (Appellant's Brief on Review, pp.28-39.)

The State's position on appeal was that both the Fifth Amendment and Idaho's sentencing law allowed for adverse inferences should a defendant invoke the right against self-incrimination and that Idaho's sentencing criteria statute did not place a burden upon the State to prove anything. (Brief on Review, pp.35-40.)

In reply, Mr. Estrada justified his assertion that the State bore a burden at sentencing, and asserted that even if the State did not have a burden, the evidence that would have been available had he not participated in the psycho-sexual evaluation would not have justified the sentence actually imposed. (Appellant's Reply Brief in Support of Petition for Review, pp.30-35.)

The Supreme Court of the State of Idaho held that Mr. Estrada's trial counsel had rendered deficient performance in failing to inform his client of his right against self-incrimination during a psychosexual evaluation that may support a harsher sentence. (Pet. App. pp.9-13.) As regards the "significance and extent of a defendant's right against self-incrimination," the court held that, "Incrimination is implicated not just when additional charges could be filed, but also when punishment could be enhanced as a result of the defendant's statements." (Pet. App. p.11 (citing *Pens v. Bail*, 902 F.2d 1464 (9th Cir. 1990), *Jones v. Cardwell*, 686 F.2d 1464 (9th Cir. 1982), I.C. §19-3003, and *State v. Anderson*, 130 Idaho 765, 947 P.2d 1013 (Idaho Ct. App. 1997).) As a general proposition, the court found that, "imposition of a harsher sentence within the statutory

range based on a defendant's statements in a psychological evaluation is a violation of the right against self-incrimination." (Pet. App. p.12.)

In relation to the question of prejudice, the Supreme Court of the State of Idaho's discussion was extremely limited. The court declined to consider whether the sentence imposed was unreasonable or excessive. (Pet. App. p.14.) Instead, the court simply held that, "Estrada has met his burden of showing that the evaluation played a role in his sentence. Therefore, Estrada has demonstrated prejudice as a result of his attorney's failure to advise him of his Fifth Amendment rights." (Pet. App. p.14.)

SUMMARY OF ARGUMENT

The State of Idaho has effectively asked this Court to reconsider the application of the right against self-incrimination to sentencing proceedings, as held in *Estelle v. Smith*, 451 U.S. 454 (1981), and *Mitchell v. United States*, 526 U.S. 314 (1999), in light of the holding in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and its progeny. However, *Mitchell* specifically addressed a sentence within the statutory maximum range and a sentencing factor for which it is permissible for judges to exercise discretion, and held that the Fifth Amendment right against self-incrimination forbid taking an adverse inference from a defendant's silence in regards to the factor. Thus, *Mitchell* addresses the application of both the Fifth Amendment and the no adverse inference rule in routine sentencing proceedings, and reconsideration of that holding is not required by *Apprendi, supra,* and its progeny.

In addition, because Idaho Code section 19-3003, which was actually cited by the Supreme Court of the State of Idaho in its determination of the significance and extent of the right against self-incrimination in Idaho sentencing proceedings is sufficient to substantiate that court's conclusion, this Court should not address the Fifth Amendment question as it would only be providing an advisory opinion on that issue.

Further, the State of Idaho suggests that the prejudice finding by the state court could only be based upon a Fifth Amendment analysis. However, the attribution to the Supreme Court of the State of Idaho of an implied finding on the significance of the Fifth Amendment's right against self-incrimination is a speculative reading of that court's holding. The Supreme Court of the State of Idaho made no such explicit finding and, due to the various statutory and constitutional grounds actually argued by Mr. Estrada against such an adverse inference, the assertion of an implied finding on any one issue is simply unfounded.

The State of Idaho has asserted that the petition should be granted because, "Review of the application of the no adverse inference rule at sentencing by courts of various jurisdictions shows that those courts are widely divergent in their conclusions about the scope of the rule." (Pet. p.17.) However, to the extent that the present case even presents the same issue as those cited by the State, review of the case law cited by the State does not support its claim that there is a current conflict of authority.

Finally, because the present case does not directly present the question of whether an adverse inference can be taken from a defendant's invocation of the right against self-incrimination during sentencing proceedings, this case

is not the best case in which to consider that issue. Instead, the question of whether, and to what extent, and under what circumstances, an adverse inference could be taken, should be reserved for a case in which the question was directly presented by a defendant that actually invoked the right against self-incrimination and was punished as a result.

ARGUMENT

A. The State Of Idaho's Assertion That There Are No Opinions Of This Court Which Address The Scope Of The Adverse Inference Rule In Routine Sentencing Proceedings Is Incorrect

The State of Idaho has effectively asked this Court to reconsider the application of the right against self-incrimination to sentencing proceedings, as held in *Estelle v. Smith*, 451 U.S. 454 (1981), and *Mitchell v. United States*, 526 U.S. 314 (1999), in light of the holding in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and its progeny. (Pet. pp.12-13.) As this Court has recognized,

> The obligation to follow precedent begins with necessity, and a contrary necessity marks its outer limit. With Cardozo, we recognize that no judicial system could do society's work if it eyed each issue afresh in every case that raised it. *See* B. Cardozo, The Nature of the Judicial Process 149 (1921). Indeed, the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable. *See* Powell, Stare Decisis and Judicial Restraint, 1991 Journal of Supreme Court History 13, 16.

Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 854 (1992).

The State of Idaho's assertion that this Court should overrule recent precedent is based upon a faulty premise. As discussed below, neither the right to a jury trial nor the doctrine discussed in *Apprendi* are applicable to the facts of *Mitchell, supra.* Because the holding in *Mitchell* is unaffected by *Apprendi*, the Petitioner's assertion that reconsideration of this Court's established precedent is necessary is unavailing.

According to the State of Idaho,

> if the fact patterns of *Estelle* or *Mitchell* re-occurred they would not be sentencing cases, and there would be no doubt that the defendants would enjoy the privilege against self-incrimination and the benefit of the no adverse inference rule because the state would bear the burden of proving to a jury, beyond a reasonable doubt, the facts at issue in those cases.

(Pet. pp.12-13.) Based upon this premise, the State of Idaho claims that there is no United States Supreme Court precedent which addresses the scope of the no adverse inference rule in routine sentencing proceedings. (Pet. p.13.)

Despite the State of Idaho's representation to the contrary, *Mitchell, supra,* specifically addressed the application of the no adverse inference rule in a routine sentencing proceeding. In *Mitchell*, the defendant pled guilty to, in part, conspiring to distribute five or more kilograms of cocaine. *Mitchell*, 526 U.S. at 317. "The penalty for conspiring to distribute cocaine had a maximum of life imprisonment." *Id.* at 320 (quoting *Mitchell v.*

United States, 122 F.3d 185 (1997)). However, within that range, the sentencing discretion of the district court was limited by applicable mandatory minimum sentences based upon the quantity of cocaine involved. *Id.* at 317. The question presented to this Court was whether, in determining the quantity of cocaine involved, the district court could apply an adverse inference against the defendant based upon her invocation of the right against self-incrimination. *Id.* at 321.

In *Apprendi*, this Court made clear that the application of the holding was limited to "any fact that increases the penalty for a crime beyond the prescribed statutory maximum." *Apprendi*, 530 U.S. at 490. Further, this Court made it abundantly clear that, "nothing in this history suggests that it is impermissible for judges to exercise discretion – taking into consideration various factors relating both to offense and offender – in imposing a judgment *within the range* prescribed by statute." *Id.* at 481. In *Harris v. United States*, 536 U.S. 545 (2002), this Court specifically found that basing a mandatory minimum sentence upon a judicially determined fact "does not evade the requirements of the Fifth and Sixth Amendments." *Id.* at 568. Although a majority did not adopt a single legal basis for this holding, a majority did agree that the mandatory minimum question was based upon a "factor" that "need not be alleged in the indictment, submitted to the jury, or proved beyond a reasonable doubt." *Id.* at 568; *see also Rita v. United States*, 551 U.S. ___ (2007) (Scalia J., concurring) ("We have repeatedly affirmed the proposition that judges can find facts that help guide their discretion *within* the sentencing range that is authorized by the facts found by the jury or admitted by the defendant.").

Mitchell specifically addressed a sentence within the statutory maximum range and a sentencing factor for

which it is permissible for judges to exercise discretion, and held that the Fifth Amendment right against self-incrimination forbid taking an adverse inference from a defendant's silence in regards to the factor. Thus, *Mitchell* is United States Supreme Court precedent which addresses the application of the no adverse inference rule in routine sentencing proceedings, and reconsideration of that holding is not justified by *Apprendi, supra,* and its progeny.

B. Because An Idaho Statute Cited By The Supreme Court Of The State Of Idaho Supports That Court's Definition Of The Scope Of The Right Against Self-Incrimination In Idaho Sentencing Proceedings, This Court Would Be Rendering An Advisory Opinion On The Fifth Amendment Question Presented

In the petition, the State of Idaho has requested that this Court consider the significance and extent of a defendant's right against self-incrimination under the Fifth Amendment to the United States Constitution. (Pet. pp.10-13.) Relying upon the dissent in *Mitchell v. United States*, 526 U.S. 314 (1999), the majority opinion in *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), and cases interpreting *Apprendi*, the State has asserted that adverse inferences can be taken from the invocation of the right against self-incrimination in presentence evaluations. (*See* Pet. pp.10-13.) However, because a state statute actually cited by the Supreme Court of the State of Idaho in its determination of the significance and extent of the right against self-incrimination in Idaho sentencing proceedings is sufficient to substantiate that court's conclusion, this Court should not address the Fifth Amendment question.

"It is quite clear that 'the oldest and most consistent thread in the federal law of justiciability is that the federal

courts will not give advisory opinions.'" *Flast v. Cohen*, 392 U.S. 83, 96 (1968) (quoting C. Wright, Federal Courts 34 (1963)). "Respect for the independence of state courts, as well as avoidance of rendering advisory opinions, have been the cornerstones of [the United States Supreme Court's] refusal to decide cases where there is adequate and independent state ground." *Michigan v. Long*, 463 U.S. 1032, 1040 (1983). Because the United States Supreme Court "has no power to review a state law determination that is sufficient to support the judgment, resolution of any independent federal ground for the decision could not affect the judgment and would therefore be advisory." *Coleman v. Thompson*, 501 U.S. 722, 729 (1991).

In that portion of its opinion addressing the "significance and extent of a defendant's right against self-incrimination," the Supreme Court of the State of Idaho cited to state law which provides sufficient adequate and independent grounds to justify its holding that in sentencing no adverse inferences can be taken from a defendant's invocation of the right against self-incrimination. (*See* Pet. App. p.11.) In addressing the scope of a defendant's right against self-incrimination in Idaho, the court found that "incrimination is implicated not just when additional charges could be filed, but also when punishment could be enhanced as a result of the defendant's statements." (Pet. App. p.11 (citation omitted).) In so holding, the court relied not only upon authority interpreting the Fifth Amendment to the United States Constitution, but also upon I.C. § 19-3003 and *State v. Anderson*, 130 Idaho 765, 947 P.2d 1013 (Idaho Ct. App. 1997). (Pet. App. pp.11-12.)

Idaho Code section 19-3003 provides that a defendant in a criminal action "is not, without his consent, a competent witness for or against himself. His neglect or refusal

to give such consent shall not in any manner prejudice him nor be used against him on the trial or proceeding." I.C. § 19-3003. In relation to this statute, the Idaho Court of Appeals has previously found that "The Idaho Legislature has further codified *and expanded* the scope of the privilege against self-incrimination in I.C. § 19-3003." *State v. Heffern*, 130 Idaho 946, 949, 950 P.2d 1285, 1288 (Idaho Ct. App. 1997) (emphasis added). Pursuant to I.C. § 19-3003, when imposing sentence an Idaho court may not use a defendant's silence to enhance a sentence within penalty range prescribed by statute. *See id.*; *see also Anderson*, 130 Idaho at 769-70, 947 P.2d at 1017-18. When information is disclosed as the result of a violation of this statute, resentencing will be necessary if the information is either "given some weight by the [sentencing court] in imposing sentence," *Anderson*, 130 Idaho at 770, 947 P.2d at 1018, or if it "contributed in some material degree to the court's decision . . . ." *Heffern*, 130 Idaho at 950, 950 P.2d at 1289.

When the Supreme Court of the State of Idaho explicitly relied upon I.C. § 19-3003 and *State v. Anderson*, 130 Idaho 765, 947 P.2d 1013 (Idaho Ct. App. 1997), in defining the significance and extent of an Idaho defendant's right against self-incrimination, the Court recognized that there were state grounds upon which its decision could rest. In light of those grounds, this Court should not issue an advisory opinion formulating a Fifth Amendment rule which is not required by the precise facts of this case.

C. Because The Idaho Supreme Court Did Not Explicitly Address – And Did Not Need To Address – The Adverse Inference Issue The State Raises, This Court Should Not Provide An Advisory Opinion On The Issue

The State of Idaho has asserted that, "What inferences may be drawn at sentencing from a defendant's refusal to assist in a court's efforts to evaluate sentencing factors other than the facts of a crime itself is an important question that can only be answered by this Court." (Pet. p.6.) However, this assertion is not entirely accurate. Because the question of whether an adverse inference can be taken during Idaho sentencing proceedings depends upon a multi-tiered analysis of both state statutory law and federal constitutional law the question cannot "only be answered by this Court." Additionally, because the Supreme Court of the State of Idaho did not explicitly address, and did not need to address, the question under the Fifth Amendment, any such finding by this Court can be nothing more than an advisory opinion on one portion of the multi-tiered analysis.

This Court has long recognized that it will not pass upon constitutional questions that were not either pressed or passed upon in state court. *See Illinois v. Gates,* 462 U.S. 213, 217-224 (1983). In addition, "It is a fundamental rule of judicial restraint . . . that this Court will not reach constitutional questions in advance of the necessity of deciding them." *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering*, 467 U.S. 138, 157 (1984) (citation omitted). Because there is no evidence of the basis of the Supreme Court of the State of Idaho's finding of prejudice, but the briefing presented various grounds to

support that holding, it is unnecessary for this Court to decide the Fifth Amendment issue.

The Supreme Court of the State of Idaho found that Mr. Estrada was prejudiced by his attorney's deficient performance in failing to advise him of his Fifth Amendment right at the time of participation in the evaluation. (Pet. App. pp.13-14.) The Court's ruling on the issue of prejudice was not specific.

> The sentencing judge's specific, repeated references to the psychosexual evaluation suggest that it did play an important role in the sentencing. While we do not pass judgment in any way on whether the sentence actually imposed on Estrada was unreasonable or excessive, nevertheless, Estrada has met his burden of showing that the evaluation played a role in his sentence. Therefore, Estrada has demonstrated prejudice as a result of his attorney's failure to advise him of his Fifth Amendment rights.

(Pet. App. pp.13-14.)

The State of Idaho claims that this holding was a rejection of the post-conviction court's holding that "there was no prejudice because Estrada's failure to cooperate in the evaluation would have led to permissible adverse inferences in sentencing. . . ." (Pet. p.4.) The State of Idaho appears to also believe that the prejudice finding could only be based upon a Fifth Amendment analysis. It argues that, "The Supreme Court of Idaho has expanded the holdings of *Estelle* and *Mitchell* beyond their stated limitations, effectively forbidding taking any adverse inference from a defendant's decision to not cooperate with presentence evaluations." (Pet. p.13.) However, the attribution to the Supreme Court of the State of Idaho of an implied

finding on the significance of the Fifth Amendment's right against self-incrimination is a speculative reading of the state court's holding. The Supreme Court of the State of Idaho made no such explicit finding and, due to the various statutory and constitutional grounds actually argued by Mr. Estrada, the assertion of an implied finding on any one issue is simply unfounded.

On appeal, Mr. Estrada did not concede that he would have received the same sentence had any permissible adverse inferences been taken from his silence. Instead, Mr. Estrada repeatedly asserted he had alleged facts which established a probability that he would have received a lesser sentence. (Appellant's Brief, pp.13-16; Appellant's Brief on Review, p.38; Appellant's Reply Brief in Support of Petition for Review, pp.28-29.) In addition, Mr. Estrada asserted that the district court erred in finding that his silence would justify an adverse inference regarding remorse and taking responsibility for the crime. He asserted that the inference was improper because he actually pled guilty to the charges against him, thus admitting factual guilt long before sentencing, and took full responsibility for his actions in the presentence investigation report. (Appellant's Brief pp.12-13; Appellant's Brief on Review, pp.32-33.)

In addressing the prejudice prong of the *Strickland v. Washington*, 466 U.S. 668 (1984), analysis, the Supreme Court of the State of Idaho recognized that Mr. Estrada had to establish "'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" (Pet. App. p.13.) The court further recognized that a reasonable probability "'is a probability sufficient to undermine confidence in the outcome.'" (Pet. App. pp.13-14.) In light of the arguments

made regarding prejudice, one appropriate reading of the court's recognition that the specific and repeated references to the report suggested that it "did play an important role in the sentencing," is that the appellate court recognized that the psychosexual report was so damaging to Mr. Estrada that there was a reasonable probability that, even if any adverse inferences could appropriately be taken, there is a reasonable probability that the report caused the sentencing court to impose a harsher sentence than it otherwise would have.

Alternatively, in his initial briefing, Mr. Estrada did assert that the district court erred in holding that the Fifth Amendment right against self-incrimination did not forbid taking adverse inferences from an assertion of the right. (Appellant's Brief, p.9.) Further, in both his initial briefing and in the petition for review briefing Mr. Estrada asserted that under state sentencing statutes, the State bore the burden of proof of certain statutory sentencing factors, and the application of any presumptions in regards to these factors based upon an adverse inference taken from Mr. Estrada's invocation of his right against self-incrimination would violate his Fourteenth Amendment right to due process as well as Idaho sentencing statutes. (Appellant's Brief, pp.16-22; Appellant's Brief In Support Of Petition For Review, pp.28-39.)

The State of Idaho's claim that the Supreme Court of the State of Idaho made an implied finding on the appropriateness of taking an adverse inference from silence presupposes that, without discussion or citation to authority, the court held that not only could such an inference be appropriately taken under the Fifth Amendment, but also appropriately taken under the Fourteenth Amendment and under Idaho's statutory sentencing scheme. Mr. Estrada submits that, absent *some* indication that the

court ruled on these issues, the necessary logical leap suggested by the State of Idaho is unwarranted.

Finally, the Supreme Court of the State of Idaho relied upon I.C. § 19-3003 in holding that there is a right against self-incrimination in Idaho sentencing proceedings. (*See* Pet. App. pp.11-12.) This statute not only creates a right against self-incrimination, it also forbids the taking of an adverse inference from the invocation of that right." *See Anderson,* 130 Idaho at 770, 947 P.2d at 1018 (applying "the statute's unambiguous directive that a defendant's refusal to testify may not prejudice him or be used against him in the criminal proceeding" to a sentencing proceeding.) The Supreme Court of the State of Idaho also cited to the exact page of the *Anderson* opinion which recognized the no adverse inference rule when it relied upon the case to find the existence of the right against self-incrimination.

Pursuant to principles of judicial restraint, the Supreme Court of the State of Idaho does not reach constitutional challenges in an appeal if the issue can be determined on statutory grounds.

> When a case can be decided upon a ground other than a constitutional ground, the Court will not address the constitutional issue unless it is necessary for a determination of the case. *Poesy v. Bunney,* 98 Idaho 258, 561 P.2d 400 (1977); *Swensen v. Buildings, Inc.,* 93 Idaho 466, 463 P.2d 932 (1970). The Court has declined to address constitutional issues on appeal when the matter can be determined on statutory grounds. *See e.g. State v. Young,* 122 Idaho 278, 283, 833 P.2d 911, 916 (1992) ("In light of our disposition on statutory grounds, we have no occasion to determine the parameters of the right to appointed

> counsel at probation revocation proceedings under our state constitution."); *Smith v. Dep't of Employment,* 100 Idaho 520, 521, 602 P.2d 18, 19 (1979) ("We do not reach the state constitutional issue raised by claimant Smith because we conclude that the statute does not bar receipt of unemployment compensation benefits by claimant Smith.").

State v. Doe, 140 Idaho 271, 273, 92 P.3d 521, 523 (Idaho 2004).

Importantly, the Supreme Court of the State of Idaho has previously explicitly refused to reach a claim that admission of psychiatric evidence at sentencing violated the defendant's rights under the Fifth Amendment of the United States Constitution specifically because the issue could be resolved by application of state evidentiary privilege rules. *See State v. Wilkins*, 125 Idaho 215, 219, 868 P.2d 1231, 1235 (Idaho 1994); *see also State v. Young*, 122 Idaho 278, 283, 833 P.2d 911, 916 (Idaho 1992) (holding that the Supreme Court of the State of Idaho "will not rule on a constitutional issue unless it is necessary to resolve the case.").

In light of the clear holding in *Anderson*, and the Supreme Court of the State of Idaho's citation to that exact page, it seems unlikely that the court ever reached the federal constitutional question presented by the State of Idaho. Furthermore, when the court's holding on prejudice is compared to the remedy for a violation of I.C. § 19-3003, the import of that statute on the opinion is clear. In the present case, the court found that "Estrada has met his burden of showing that the evaluation played a role in his sentence." (Pet. App. p.14.) Similarly, and as previously noted, when information is disclosed as the result of a

violation of I.C. § 19-3003, resentencing will be necessary if the information is either "given some weight by the [sentencing court] in imposing sentence," *Anderson*, 130 Idaho at 770, 947 P.2d at 1018, or if it "contributed in some material degree to the court's decision . . . ." *Heffern*, 130 Idaho at 950, 950 P.2d at 1289.

Only if the Supreme Court of the State of Idaho first found that there were no state statutory grounds which prevented taking an adverse inference would the court have reached the federal constitutional questions, including the one now raised by the State in its Petition for Writ of Certiorari. Based upon the briefing in this case as well as the authority relied upon by the Supreme Court of the State of Idaho, there were various grounds upon which the state court may have found that Mr. Estrada was prejudiced by his attorney's deficient performance, including a possible violation of I.C. § 19-2521, the Idaho sentencing criteria statute, a possible violation of I.C. § 19-3003, the Idaho statute which expands the scope of the privilege against self-incrimination, the due process clause of the Fourteenth Amendment, or the Fifth Amendment right against self-incrimination. However, the court did not identify any of these as the actual basis of its ultimate holding, and the State of Idaho now asks this Court to consider only one of these rationales. Because the Fifth Amendment claim was not the only possible grounds for prejudice briefed by the parties, nor even the most likely ground reached by the state court, any claim that such a finding is implied by the opinion is speculative at best.

For prudential reasons, the United States Supreme Court will not review judgments of state courts that rest on adequate and independent state grounds. *See, e.g., Michigan v. Long*, 463 U.S. 1032, at 1041-42 (1983). It is

incumbent upon the Court to ascertain for itself whether an adequate and independent state ground adequately supports the state court's judgment. *Id.* at 1038 (citing *Abie State Bank v. Bryan,* 282 U.S. 765, 773 (1931)). In doing so, when,

> a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so.

Id. at 1040-41.

In the present case, the Supreme Court of the State of Idaho did not explicitly articulate the basis for its holding that Mr. Estrada was prejudiced. Nevertheless, the adequacy and independence of the state law ground is clear from the face of the state court opinion. In the absence of at least some indication that the state court was rejecting the State's Fifth Amendment argument, it cannot be said that the decision fairly appears to rest primarily on the question presented by the State in the Petition for Certiorari, or even to be interwoven with the question presented. Instead, the finding of prejudice may be based upon many different claims made by Mr. Estrada, including Idaho statutes.

Because the State's attribution to the Supreme Court of the State of Idaho of an implied finding on the question of whether an adverse inference can be drawn from an invocation of the right against self-incrimination is merely an assumption, any resolution of the claim raised by the

State would be an advisory opinion. Even if this Court were to correct any alleged state court view of the Fifth Amendment, the Supreme Court of the State of Idaho's interpretations of Idaho statutory sentencing law, the due process clause of the Fourteenth Amendment, and the application of Idaho Code section 19-3003 would have to be considered, likely leading to the same result in the present case.

D. Review Of The Case Law Cited By The State Of Idaho Does Not Support Its Claim That There Is A "Widely Divergent" Conflict Of Authority Necessitating The Granting Of The Petition Of Certiorari In This Case

The State of Idaho has asserted that the Petition for Writ of Certiorari should be granted because, "Review of the application of the no adverse inference rule at sentencing by courts of various jurisdictions shows that those courts are widely divergent in their conclusions about the scope of the rule." (Pet. p.17.) However, to the extent that the present case even presents the same issue as those cited by the State, review of the case law cited by the State does not support its claim that there is a conflict of authority on current law.

1. This Case Does Not Provide A Proper Vehicle To Address The Question Of Whether A Defendant Can Invoke His Right Against Self-Incrimination And Still Receive A Reduced Sentence

One part of the three-pronged split of authority alleged by the State of Idaho is "courts that allow a sentencing court to draw inferences from a defendant's silence

in declining to find downward adjustments of a sentence, but do not allow inferences that would increase the sentence." (Pet. pp.16-17.) While this line of authority clearly exists, because Idaho has an indeterminate sentencing scheme which does not require proof of any facts to justify a reduced sentence, this case is not a proper vehicle to address the propriety of that line of authority.

The United States Supreme Court "'has no jurisdiction to pronounce any statute, either of a state or of the United States, void, because irreconcilable with the constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies.'" *United States v. Raines*, 362 U.S. 17, 21 (1960) (quoting *Liverpool, New York & Philadelphia S.S. Co. v. Commissioners of Emigration*, 113 U.S. 33, 39 (1885)). In the exercise of this jurisdiction, the United States Supreme Court is bound by the rule that it will never "'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'" *Id.*

In addressing the case at bar, this Court would not be required to formulate a rule on whether courts can allow a sentencing court to draw inferences from a defendant's silence in declining to find downward adjustments of a presumptive sentence because Idaho's sentencing law does not provide for such a procedure. As was recognized by the Supreme Court of the State of Idaho, Mr. Estrada was convicted of rape. (Pet. App. p.1.) In Idaho, "Rape is punishable by imprisonment in the state prison not less than one (1) year, and the imprisonment may be extended to life in the discretion of the District Judge, who shall pass sentence." I.C. § 18-6104. Idaho's statutory sentencing scheme is "an 'indeterminate' sentencing system in which the defendant is given a sentence with a minimum

and a maximum." *State v. Stover*, 140 Idaho 927, 931, 104 P.3d 969, 973 (Idaho 2005) (citing I.C. § 19-2513). In determining the maximum sentence that may be imposed for a crime, "the maximum is not determined by the trial judge, but is set by law." *Id.* (citing I.C. § 19-2513). The sentencing scheme "requires no findings of fact . . ." *Id.* (citing I.C. § 19-2521). In determining the appropriate sentence to impose in any case, "The legislative history and statutory language are clear in stipulating that the district court's decision-making process should include a review of I.C. § 19-2521 criteria but the district court's own discretion or opinion is the final authority." *Id.* at 932, 104 P.3d at 974. As regards the granting of probation, a "sentencing court has inherent power to suspend a sentence" and "Idaho Code § 19-2521 does nothing to infringe upon the sentencing court's inherent power to impose or suspend a sentence." *Id.* at 932, 104 P.3d at 974. Finally, "Idaho's review of sentences is under an abuse of discretion standard and is not dependent upon [a] specific fact finding enforced statute." *Id.*

The State of Idaho is correct that there are cases in which the courts have held that a defendant cannot stand silent and meet his burden of justifying a downward adjustment to his sentence. (*See* Pet. pp.16-17 (citation omitted).) However, whether this is appropriate is not presented in the case at bar because Idaho's indeterminate sentencing law does not provide for downward departures from a presumptive sentence. Because the facts of this case do not present the question of whether a downward departure of a presumptive sentence can be withheld based upon a defendant's invocation of the right against self-incrimination, this Court will not have jurisdiction to

decide that issue even if it were to grant the Petition for Writ of Certiorari.

2. Three Of The Five States Which The State Of Idaho Asserts Limit The No Adverse Inference Rule To The Facts Of The Crime Have Not Actually Done So

In support of its claim that there is a "widely divergent" conflict of authority, the State of Idaho cites a series of cases which the State claims either directly limit the no adverse inference rule, or supports that proposition. (Pet. p.16.) However, review of the cases cited does not support the State's assertion.

The State of Idaho relies upon *State v. Spencer*, 70 P.3d 1226 (Kan. Ct. App. 2003). A review of *Spencer* shows that the issue before that court was "not the extent of the sentence to be entered." *Id.* at 1229. In fact, the presumptive sentence in that case was probation, which is exactly the sentence that was imposed. *Id.* at 1227. Rather, the issue presented was what terms of probation could be imposed upon the defendant. *Id.* at 1229. Although that court did distinguish *Mitchell* it did not impose a harsher sentence based upon the invocation of the right against self-incrimination. See *id.* at 1229. However, as was specifically discussed in *Spencer*, the Court of Appeals of Kansas has addressed the question of whether a defendant can be given a harsher sentence based upon the invocation of that right. *Id.* (citing *State v. Aikman*, 26 P.3d 1276 (Kan. Ct. App. 2001)). In *Aikman*, the appellate court found that the sentencing court had "made a negative inference from Aikman's refusal to disavow affiliation with [a gang]." *Aikman*, 26 P.3d at 1279. The court vacated the sentence holding that, "A sentencing hearing is part of the criminal

case, and the concerns mandating the rule against negative inferences at trial apply with equal force at sentencing." *Id.* Thus, the Kansas court's precedent is not in conflict with the holding the State of Idaho asserts is implied by the Supreme Court of the State of Idaho's opinion.

Neither does *People v. Brady*, 765 N.E.2d 289 (N.Y. 2002), support the State of Idaho's assertions. Just as with *Spencer*, in *Brady* the court did not actually address the question of whether an adverse inference could be taken from a defendant's invocation of the right against self-incrimination. Rather, the court addressed whether a defendant who took the stand during a criminal trial could be questioned about a separate pending case in which the defendant had admitted facts and pled guilty. *Id.* at 290. The Court of Appeals of New York found that the defendant could have been cross-examined to the extent of his previous admissions during the guilty plea hearing. *Id.* at 291-92. In so holding, the court distinguished *Mitchell* only to the extent it noted that there was the possibility of incrimination in *Mitchell*, and the limitations on the scope of cross-examination of Brady had removed any possibility of incrimination. *Id.* at 292. Thus, *Brady* did not address the question here.

The State of Idaho also relies upon *State v. Heffran*, 384 N.W.2d 351 (Wis. 1986). However, like *Spencer* and *Brady*, the Supreme Court of Wisconsin did not address the question of whether an adverse inference could be taken from a defendant's invocation of the right against self-incrimination. The question in *Heffran* was whether a presentence interview was accusatory in nature such that a defendant was entitled to be informed of his *Miranda* rights prior to participating. *Id.* at 352-53. In this case

which predates *Mitchell*, the court was not presented with an instance where the defendant invoked his right to silence, but rather an instance where the defendant made a series of admissions to past criminal conduct. *Id.* at 352-353. Thus the question of whether an adverse inference could be taken from silence was not at issue. *But see State v. Ernst*, 699 N.W.2d 92, 104 n.12 (Wis. 2005) (declining to extend *Mitchell* to collateral attacks on a conviction and noting in dicta that "other courts have declined to extend *Mitchell* to situations involving sentence enhancements, where there is no inquiry about the factual details of the underlying crime.").

Because neither *Spencer, Brady*, nor *Heffran* actually addressed the question presented in the present Petition for Writ of Certiorari, they do not support the State of Idaho's assertion that there is a "widely divergent" conflict of authority necessitating the granting of the present petition.

3. Because The Two States Which Have Held That Adverse Inferences Can Be Taken In Regards To Facts Other Than Facts Of The Crime Predate This Court's Opinion In *Cunningham v. California* They Do Not Provide A Current Conflict Of Authority

Courts in two states have previously held that an adverse inference can be taken from a defendant's assertion of the right against self-incrimination in regards to facts other than facts of the crime. *See Lee v. State*, 36 P.3d 1133 (Wyo. 2001) and *State v. Muscari*, 807 A.2d 407 (Vt. 2002). However, both of these cases predated this Court's decision in *Cunningham v. California*, ___ U.S. __, 127 S.Ct. 856 (2007). *Cunningham* confirms that the holding

in *Mitchell* applies to all types of facts, not simply the facts of a crime. This Court held in *Cunningham* that the Constitution treats *all* sentence-enhancing facts (other than the fact of a prior conviction) the same, regardless of whether they relate strictly to offense conduct – like the factors at issue here – to the offender himself. *See Cunningham*, ___ U.S. at ___, n.14, 127 S.Ct. at 869, n.14 (holding that "*Apprendi,* itself, however, leaves no room for the bifurcated approach . . . '*Any* fact that increases the penalty for a crime beyond the statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.'"). Thus, any conflict of authority based upon treating factors differently depending upon whether they relate to the facts of the crime or relate to the offender must be reconsidered in light of this Court's decision in *Cunningham*. The states of Wyoming and Vermont should be given the opportunity to reconsider their previous holdings in light of *Cunningham*, and other states should have the opportunity to consider the import of *Cunningham*, prior to a determination that there is a conflict of authority on the current law.

E. Review Of The Question Presented Should Be Reserved For A Case In Which A Defendant Actually Invokes The Right Against Self-Incrimination And Was Punished As A Result

In the present case, Mr. Estrada was not able to actually remain silent. Neither has a sentencing court actually taken an adverse inference from his silence. Importantly, he has not yet had the effective assistance of counsel at a sentencing hearing such that he can address the question of whether any adverse inferences are justified under

the facts of his case. Rather, as a collateral attack to a conviction, this case requires a noetic endeavor into what would have happened if Mr. Estrada would have had effective assistance of counsel and would have invoked the right. Because the present case does not directly present the question of whether an adverse inference can be taken from a defendant's invocation of the right against self-incrimination during sentencing proceedings, this case is not the best case in which to consider that issue. Instead, the question of whether, and to what extent, and under what circumstances an adverse inference could be taken, should be reserved for a case in which the question was directly presented by a defendant that actually invoked the right against self-incrimination and was punished as a result.

CONCLUSION

For the reasons set forth above, the respondent herein submits that a writ of certiorari should not be granted in this case.

Respectfully submitted,

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No. 06-1410

FILED

JUL 19 2007

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SUPREME COURT, U.S.

In The

Supreme Court of the United States

STATE OF IDAHO,

Petitioner,

v.

KRISPEN ESTRADA,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Idaho

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A. Certiorari Is Appropriate In This Case Because The Decision Of The Supreme Court Of Idaho Is Based Upon The Fifth Amendment Of The United States Constitution And Expands The No Adverse Inference Rule Far Beyond What Has Been Required Or Even Intimated By This Court

Grant of certiorari is appropriate in this case because this Court has left open the question raised in the petition: whether the no adverse inference rule prohibits a sentencing court from drawing adverse inferences other than in determining facts related to the crime of conviction. (Petition for Writ of Certiorari, pp. 6-13 (citing *Mitchell v. United States*, 526 U.S. 314 (1999).) Estrada opposes the petition, arguing that this ground is not sufficient for granting the writ by claiming (1) that the Petitioner's argument that the precedential value of *Mitchell* has been eroded by subsequent Sixth Amendment cases is flawed (Respondent's Brief in Opposition, pp. 9-12); (2) that the opinion of the Supreme Court of Idaho was based upon adequate and independent state grounds and not upon application of the no adverse inference rule of the Fifth Amendment (id. at 12-23); and (3) that this Court should wait to address this issue in a case in which the defendant actually invoked his right to silence (id. at pp. 29-30). Review of Estrada's arguments for denial of certiorari shows them to be unpersuasive.

1. Certiorari is Appropriate in Part Because the Precedential Value of *Mitchell* has been Eroded by Subsequent Decisions Regarding the Scope of the Sixth Amendment Right to a Jury Trial

In *Mitchell*, the district court found, based in part upon Mitchell's silence, that the amount of cocaine she had

conspired to traffic was "over the 5-kilogram threshold," and thus imposed the mandatory minimum penalty of ten years imprisonment. *Mitchell v. United States*, 526 U.S. 314, 319-20 (1999). One of the grounds (but certainly not the primary one) for granting this petition is that if the fact pattern of *Mitchell* were to repeat itself Mitchell would be entitled to have a jury decide whether the amount of cocaine she conspired to distribute was over the five-kilogram threshold of 21 U.S.C. § 841(b)(1)(A)(ii). *Apprendi v. New Jersey*, 500 U.S. 466 (2000). Because the factual question specifically addressed in *Mitchell* is now a jury question for trial, and not a sentencing question for a judge, the *Mitchell* opinion is currently of questionable utility in determining the extent of the no adverse inference rule in routine sentencing proceedings. (*See* Petition, pp. 12-13.)

In responding to the Petition, Estrada contends that the premise of this argument is flawed. Specifically, Estrada argues that the five-kilogram threshold finding only made a minimum sentence applicable to Mitchell, and did not increase the maximum sentence. (Respondent's Brief in Opposition, pp. 10-12.) This, Estrada argues, means that *Apprendi*, which applies only to factual findings that would increase maximum penalties, would not have granted Mitchell the right to a jury determination that the amount of cocaine involved in the conspiracy met the five-kilogram threshold. (Id. at 12 (citing *Harris v. United States*, 536 U.S. 545 (2002) (no right to jury trial on facts establishing minimum sentences).)

The flaw in Estrada's argument is that it misconstrues federal narcotics law. The five-kilogram threshold finding made Mitchell eligible for a sentence of not less than ten years and not more than life. 21 U.S.C. § 841(b)(1)(A)(ii). Absent a finding of at least five kilograms of cocaine,

however, the applicable *maximum* sentence would have been much less than life. 21 U.S.C. § 841(b)(1)(B) (maximum sentence for distributing more than 500 grams of cocaine is forty years); 21 U.S.C. § 841(b)(1)(C) (maximum sentence for distributing more than fifty grams of cocaine is 20 years). Questions of drug quantity that determine the applicable maximum sentence are elements of the crime requiring submission to a jury. *See, e.g., United States v. Gonzalez*, 420 F.3d 111, 120-31 (2d Cir. 2005); *United States v. Promise*, 255 F.3d 150, 154-57 (4th Cir. 2001) (joining the D.C., 5th, 6th, 7th, 8th, 9th, 10th, and 11th Circuits on this issue); *United States v. Hollis*, ___ F.3d ___, 2007 WL 1760701 (9th Cir., June 20, 2007).

Estrada's argument is without merit; if the fact pattern of *Mitchell* were to re-occur, Mitchell would be entitled to a jury determination of whether the amount of cocaine she conspired to distribute was five kilograms or more because it is an element of the crime. Thus, the determination that Mitchell was entitled to the benefit of the no adverse inference rule in sentencing proceedings is of questionable ongoing utility in cases not involving elements of the crime.

2. The Supreme Court of Idaho Decision in this Case Was Based Upon Federal Constitutional Law, Not Independent and Adequate State Grounds

"Respect for the independence of state courts, as well as avoidance of rendering advisory opinions, have been the cornerstones of this Court's refusal to decide cases where there is an adequate and independent state ground." *Michigan v. Long*, 463 U.S. 1032, 1040 (1983). This Court will "accept as the most reasonable explanation that the

state court decided the case the way it did because it believed that federal law required it to do so" if the state court decision "fairly appears to rest primarily on federal law" or is "interwoven with the federal law," and "the adequacy and independence of any possible state law ground is not clear from the face of the opinion. . . ." *Id.* at 1040-41. The state law ground is rendered clear on the face of the opinion if the court relying on federal precedents "make[s] clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the state court has reached." *Id.* at 1041.

Estrada argues that the decision of the Supreme Court of Idaho was based upon adequate and independent state grounds because the court cited an Idaho statute, Idaho Code § 19-3003, which makes a criminal defendant incompetent to testify in criminal proceedings without his consent. (Respondent's Brief in Opposition, pp. 12-14.) He also argues that the Supreme Court of Idaho necessarily decided application of the no adverse inference rule on state law grounds (or did not decide the question at all) because it did not specifically state its reasoning. (Respondent's Brief in Opposition, pp. 15-23.) No reading of the Supreme Court of Idaho's opinion, however, supports the conclusion that this case was decided on grounds other than application of Fifth Amendment law.

The Supreme Court of Idaho's opinion specifically states that Estrada's petition for post-conviction relief asserted that his counsel was ineffective "based on his attorney's failure to advise Estrada of his Fifth Amendment privilege to refuse to submit to a court-ordered psychosexual evaluation for sentencing purposes." (Petition App. 1.) The court noted that the district court had

found deficient performance, but no prejudice, based upon its reading of the Fifth Amendment. (Id. at 3-4.) It noted that the parties had "limited their analysis of ineffective assistance of counsel to the federal framework" and stated it was likewise limiting its own analysis.[1] (Id. at 9.) The court repeatedly referenced, cited to, and relied upon the Fifth Amendment and cases interpreting it. (Id. at 10-12.) After exclusive reliance upon federal law, the court, using the signal "*see also*," cited an Idaho statute and case interpreting that statute. (Id. at 11-12.) Although the opinion does reference Idaho law (using a "*see also*" signal) after relying on federal law, such reference, in context, does not amount to a "plain statement" that federal law was only used for guidance and did not control the result.

The court then went on to address the prejudice prong of the ineffective assistance of counsel claim, stated the Sixth Amendment standard for showing prejudice, and concluded that Estrada had met his burden of showing prejudice by "showing that the evaluation played a role in his sentence." (Id. at 13-14.) Significantly, the Supreme Court of Idaho reversed the district court, which had

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[1] Estrada asserts he argued "various statutory and constitutional grounds" in his prejudice claim. (Respondent's Brief in Opposition, p. 17.) The only state law he actually claims he relied on was unspecified "state sentencing statutes" regarding "certain sentencing factors." (Id. at 18; *see also* id. at 4, 5 (citing to same pages of briefing referenced in argument without stating what state law was allegedly referenced).) It is noteworthy that the only Idaho "sentencing statute" referenced in the response brief is to Idaho Code § 19-2521, which sets forth factors to be considered in whether to grant probation (Respondent's Brief in Opposition, pp. 21, 25), and no mention of provisions of the Idaho Constitution is made. These vague and half-supported claims are not sufficient grounds for disregarding the Supreme Court of Idaho's statement that both the parties' arguments and its own analysis were "limited" to the "federal framework."

concluded that Estrada had not met his burden of showing prejudice because the sentencing court could have drawn at least limited negative inferences at sentencing under the Fifth Amendment had Estrada refused to cooperate with the evaluation. (Id. at 42-47.) Estrada's argument that the Supreme Court of Idaho was not addressing the grounds for the only part of the district court's decision it was reversing, or was reversing it on unstated state law grounds when the district court had relied on the Fifth Amendment, is simply without merit.

3. This Case Does Present a Proper Vehicle for Addressing the Fifth Amendment Question of What, if any, Inferences a District Court May Draw from a Defendant's Refusal to Participate in Sentencing Evaluations

Estrada also argues that this case is not a proper vehicle for review of the question of whether adverse inferences can be drawn from a defendant's refusal to cooperate in sentencing evaluations, a question left open in *Mitchell*, because this case did not arise directly from his assertion of silence but instead from his assertion that he would have remained silent had his attorney told him he had that right. (Respondent's Brief in Opposition, pp. 29-30.) This, Estrada argues, would require this Court to engage in the "noetic endeavor" of determining what would have happened if he had invoked his right. (Id. at 30.) Any "noetic endeavor" of determining prejudice from ineffective assistance of counsel under the Sixth Amendment, however, would still fall upon the Idaho courts. The Petition requests this Court to address only the Fifth Amendment question of whether, and what, inferences may be drawn by a sentencing court if a criminal defendant

declines cooperation in sentencing evaluations. Once that determination is made, remand for any further analysis that may be required would be appropriate.

This case presents a significant issue of constitutional law. At present, this Court's jurisprudence provides little guidance on this issue. This is an issue of tremendous importance, especially to states. The State of Idaho therefore respectfully requests that certiorari be granted.

B. Certiorari Is Appropriate In This Case Because The Decision Of The Supreme Court Of Idaho Places Idaho At One End Of A Three-Way Split In How Jurisdictions Apply The No Adverse Inference Rule At Sentencing

As stated in the Petition, courts generally take one of three different positions in relation to application of the no adverse inference rule at sentencing: either that adverse inferences may be drawn except as to the facts of the crime, that adverse inferences may be drawn only in relation to potential grounds for granting a lesser sentence, or that no adverse inferences whatsoever may be drawn. (Petition, pp. 13-17.) Estrada acknowledges that these three groups of authority actually exist, but insists that one group (courts allowing adverse inferences to reject reductions in sentence length) is irrelevant and that another (courts allowing any adverse inferences other than the facts of the crime) is small and inconsistent with subsequent precedent of this Court. (Respondent's Brief in Opposition, pp. 23-29.) Review of Estrada's arguments confirms that there is a three-way split in authority, making certiorari in this case appropriate.

1. Estrada's Argument That Certiorari Should Not Be Granted Because Idaho Has Not Codified Mitigating Factors in Sentencing is Without Merit

Estrada first argues that because Idaho does not have a sentencing scheme with some sort of codified or rule-based criteria for reduction of sentence from a baseline there is no actual controversy in this case. (Respondent's Brief in Opposition, pp. 23-26.) Estrada has failed, however, to establish that lack of codification of specific downward departures in sentencing is relevant to the question of whether granting certiorari is appropriate to resolve the split in authority on application at sentencing of the Fifth Amendment rule against adverse inferences. Even if it were relevant, Idaho law does allow courts to consider mitigating factors in sentencing, even absent codification of how such mitigating factors should be employed to reduce a sentence.

In Idaho, like in most jurisdictions, factors such as remorse and acceptance of responsibility are considered mitigating. *See, e.g., State v. Jones*, 141 Idaho 673, 676-77, 115 P.3d 764, 767-68 (Idaho App. 2005) (rejecting claim that sentence was excessive in light of mitigating factors such as demonstration of remorse and acceptance of responsibility). That such mitigating factors are not specifically codified by statute or rule does not mean that application of the no adverse inference rule would be different in Idaho than in jurisdictions that have chosen to codify downward departures or include them in sentencing guidelines. Estrada has failed to show how the lack of codification of mitigating sentencing factors in Idaho is relevant to the decision of whether to grant certiorari in this case to resolve a split in authorities.

2. Estrada's Argument That Decisions of This Court Have Already Resolved This Split in Authorities is Incorrect

The Petition cites to decisions from state courts that have concluded that the stated holding in *Mitchell* requires application of the no adverse inference rule at sentencing only in relation to factual findings about the circumstances of the crime itself. (Petition, pp. 15-16.) Estrada points out that the cases cited in support of this argument with a "*see also*" signal are not on point. (Respondent's Brief in Opposition, pp. 26-28.) The "*see also*" signal itself, however, shows that these cases were not on point, but merely examples of courts that have used language supportive of the general proposition without directly deciding it. *See The Bluebook, A Uniform System of Citation*, § 1.2, p. 23 (17th Ed., 2000) (Signal "*see also*" means: "Cited authority constitutes additional source material that supports the proposition. . . . [C]ommonly used to cite an authority supporting a proposition when authorities that state or directly support the proposition already have been cited or discussed."); Dickerson, *ALWD Citation Manual, A System of Citation*, § 44.3, p. 300 (2nd Ed., 2003) ("*See also*" signal "may be used when the cited authority supports the point made, but is in some respect distinguishable from previously cited cases."). That the Petitioner has cited to relevant and supportive authority not directly on point does not show a lack of a split in authority or that certiorari should not be granted.

Estrada next argues that courts holding that *Mitchell* applies the no adverse inference rule only to determination of the facts of the crime "should be given the chance to reconsider" in light of *Cunningham v. California*, ___ U.S. ___, ___ n.14, 127 S.Ct. 856, 869 n.14 (2007), "prior to a

determination that there is a conflict of authority on the current law." (Respondent's Brief in Opposition, pp. 28-29.) The cited footnote in *Cunningham* rejects an approach bifurcating "facts concerning the offense" and "facts concerning the offender" for analysis of whether a defendant is entitled to a jury determination under the Sixth Amendment. *Cunningham*, ___ U.S. at ___ n.14, 127 S.Ct. at 869 n.14. The Petitioner respectfully submits that there is no reason to deny certiorari in this case for the purpose of allowing certain state courts to reconsider whether this footnote in a Sixth Amendment decision might change their holdings regarding the scope of the Fifth Amendment.

As established in the Petition (pp. 13-17), there is a three-way split in authority regarding the scope of the no adverse inference rule in sentencing. Granting certiorari to resolve this split on this important issue is appropriate.

Respectfully submitted,

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No. 06-1410

Supreme Court, U.S.
FILED
MAY 24 2007
OFFICE OF THE CLERK

In The Supreme Court of the United States

IDAHO,

Petitioner,

vs.

KRISPEN ESTRADA,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court of Idaho

BRIEF OF *AMICI CURIAE* OF THE STATES OF IOWA, ARKANSAS, COLORADO, MICHIGAN, MINNESOTA, MONTANA, NEVADA, NEW HAMPSHIRE, NORTH DAKOTA, TENNESSEE, TEXAS, UTAH, VERMONT, AND WEST VIRGINIA, AND THE COMMONWEALTH OF PUERTO RICO IN SUPPORT OF THE PETITION

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QUESTION PRESENTED

May a sentencing court draw adverse inferences from a defendant's refusal to cooperate in a presentencing evaluation without violating the Fifth Amendment privilege against self-incrimination?

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INTEREST OF THE *AMICI CURIAE*

The *amici* states, through their Attorneys General, respectfully submit their brief in support of the petitioner.

The states have a substantial interest in ensuring the accurate sentencing and rehabilitation of defendants following their criminal convictions. To that end, presentence investigation reports provide a central source of information for sentencing judges and departments of corrections. Moreover, psychosexual examinations are an important tool in evaluating the ongoing risk and treatment needs of sexual offenders. The states' efforts in gathering pertinent information about sexual offenders would be hindered if other state appellate courts were to follow the lead of the Idaho Supreme Court in broadly interpreting the Fifth Amendment privilege against self-incrimination to allow convicted sex offenders to refuse participation in such evaluations without any worry that the sentencing court may draw an adverse inference from that refusal.

A defendant's willingness to cooperate with presentence investigators provides a good measure of whether he or she will respond to rehabilitative efforts and pose no further threat to society. Forcing a sentencing court to turn a blind eye to a defendant's lack of cooperation diminishes the accuracy of sentencing determinations, while not advancing the purposes of the Fifth Amendment privilege.

State appellate courts have reached inconsistent decisions whether sentencing courts may draw adverse inferences from a convicted defendant's silence at sentencing regarding matters other than the facts of the offense. Such inconsistency leaves the states in doubt about their

ability to enforce court orders regarding participation in psychosexual evaluations and other presentence investigations and to argue noncompliance as a factor in their sentencing recommendations. A consistent and appropriately narrow application of the Fifth Amendment in the sentencing context is of great importance to the *amici* states.

For these reasons, 15 states urge the Court to grant certiorari and resolve this important question.

REASONS FOR GRANTING THE PETITION

In *Mitchell v. United States*, 526 U.S. 314 (1999), the Court expressly left open the question of whether the no-adverse-inference rule applies at sentencing outside the judicial fact-finding context. Lower courts, in addressing that open question, have experienced the "decent period of confusion" anticipated by the dissent. *See Mitchell v. United States*, 526 U.S. at 340 (1999) (Scalia, J., dissenting). Idaho's petition should be granted to clarify the scope of the Fifth Amendment privilege as applied to cooperation with presentence investigations.

This Court has interpreted the Fifth Amendment as prohibiting a trial court from drawing an adverse inference based on the defendant's silence at the sentencing hearing when determining facts about the crime which bear upon the severity of the sentence. *Mitchell v. United States*, 526 U.S. at 316-17. Although the Idaho Supreme Court did not cite *Mitchell* in *Estrada v. State*, 149 P.3d 833 (Idaho 2006) decision, the state appellate court implicitly expanded the no-adverse-inference rule to shield a convicted rapist from any consequences related to his refusal to

cooperate with a court-ordered psychosexual evaluation. Such an expansive interpretation of *Mitchell* will deprive sentencing courts of valuable information about convicted sex offenders which can be gathered only through psychosexual evaluations.

The states advance two reasons for granting the petition. The first reason is a practical one: an expansion of the no-adverse-inference rule beyond the facts in *Mitchell* will reduce the flow of information to sentencing courts. The second reason is more theoretical: the renaissance of the Sixth Amendment jury trial right, whereby no sentence-enhancing facts may be reserved for determination by the sentencing judge, should influence this Court's view of how broadly to apply the Fifth Amendment privilege against self-incrimination at sentencing.

On the practical side, many state statutes now require or permit courts to order convicted sex offenders to undergo psychosexual evaluations before sentencing. These evaluations provide much-needed insight into an offender's potential for recidivism, treatment amenability, supervision concerns, potential risk issues and treatment goals. If the reasoning in *Estrada* carries the day, convicted sex offenders have little incentive to submit to a court-ordered evaluation. Courts could draw no inference from their refusal, while submitting to the testing could reveal damaging facts about their deviant sexual history. Without access to the information obtained in psychosexual evaluations, sentencing courts will reach less accurate sentencing decisions. State courts have reached inconsistent decisions when applying *Mitchell's* no-adverse-inference rule to presentencing issues. It is important to the states that this Court enunciate a clear rule regarding a sentencing court's ability to consider a defendant's noncompliance with court-ordered presentence evaluations.

On the theoretical side, this Court should grant review to consider whether recent case law reinvigorating the Sixth Amendment jury trial guarantee also should inform the Fifth Amendment self-incrimination analysis. This Court's Sixth Amendment jurisprudence has begun to extricate elemental findings from the sentencing realm and return them to be adjudicated by a jury at trial. *See, e.g.*, *United States v. Booker*, 543 U.S. 220 (2005) (mandatory use of federal sentencing guidelines violated right to jury trial on any fact required to enhance a criminal sentence); *Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000) (holding that other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt). This move to restore the Sixth Amendment jury trial right requires reexamination of the extension of the Fifth Amendment right against self-incrimination into non-capital sentencing decisions.

This Court's case law has "long recognized a natural dichotomy between guilt and penalty phases." *Mitchell v. United States*, 526 U.S. at 338 (Scalia, J., dissenting). Because many facts which increase the penalty for a crime may not be determined at sentencing under the resurgence of the Sixth Amendment jury trial right, Fifth Amendment self-incrimination concerns at sentencing are greatly reduced. This Court should grant review to consider the impact of *Apprendi* and its progeny on the potential expansion of the no-adverse-inference rule of *Mitchell*.

I. Expansive interpretations of *Mitchell v. United States* leave convicted defendants with little incentive to cooperate with court-ordered psychosexual evaluations, curtailing the availability of valuable information to assist sentencing courts in reaching the appropriate disposition for sexual offenders like Estrada.

The states have a keen interest in reducing sex crime recidivism by imposing appropriate sentences and providing offenders with the most effective treatment and supervision. To successfully manage sex offenders, "key decision makers must have routine access to thorough, reliable, and individualized assessment data, including presentence investigations and psychosexual evaluations conducted by specially trained sex offender management professionals." Madeline Carter, Kurt Bumby and Thomas Talbot, *Promoting Offender Accountability and Community Safety through the Comprehensive Approach to Sex Offender Management*, 34 Seton Hall L. Rev. 1273, 1282 (2004). More generally, presentence investigation (PSI) reports are "critical in assisting judges in rendering sentencing decisions and providing vital information to correctional officials in determining classifications and release decisions" and "remain the most influential document in the sentencing of criminal defendants." Daniel Macallair, *The History of the Presentence Investigation Report*, Center on Juvenile and Criminal Justice (2002).[1]

More than 50 years ago, this Court endorsed the work of presentence investigators and the value of their product to accurate sentencing determinations:

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[1] This article is available at www.cjcj.org/pubs/index.php, last visited on May 7, 2007.

> Under the practice of individualizing punishments, investigation techniques have been given an important role. Probation workers making reports of their investigations have not been trained to prosecute but to aid offenders. Their reports have been given a high value by conscientious judges who want to sentence persons on the best available information rather than on guesswork and inadequate information. [] To deprive sentencing judges of this kind of information would undermine modern penological procedural policies that have been cautiously adopted throughout the nation after careful consideration and experimentation.

Williams v. New York, 337 U.S. 241, 250 (1949) (rejecting argument that due process prohibited sentencing court from considering information obtained outside the courtroom concerning "the convicted person's past life, health, habits, conduct, and mental and moral propensities").

In preparation for sentencing Estrada on his rape conviction, the Idaho district court ordered him to undergo a psychosexual evaluation. Idaho state law requires certain offenders to undergo a psychosexual evaluation upon conviction if mandated by the court. The statute provides:

> If ordered by the court, an offender convicted of any offense listed in section 18-8304, Idaho Code, shall submit to an evaluation to be completed and submitted to the court in the form of a written report from a certified evaluator as defined in section 18-8303, Idaho Code, for the court's consideration prior to sentencing and incarceration or release on probation.

Idaho Code § 18-8316. Idaho state law defines a psychosexual evaluation as "an evaluation which specifically addresses sexual development, sexual deviancy, sexual history and risk of reoffense as part of a comprehensive evaluation of an offender." Idaho Code § 18-8303(11).

The evaluation did not seek the defendant's testimony on any fact regarding the crime the State needed to prove to increase his punishment. Rather, "[t]he information provided in the evaluation allowed the district court to make a more informed, appropriate sentencing decision that best furthered the sentencing goals set forth in [Idaho Code] § 19-2521." *Estrada v. State*, 2005 WL 2436232 (Idaho App. 2005), *reversed by Estrada v. State*, 149 P.3d 833 (Idaho 2006).

When Estrada balked at being evaluated, his attorney advised him to submit to the evaluation: "We would not want the judge to consider your lack of cooperation to mean that you are not willing to comply with court orders." That advice should have been considered sound. A convicted sex offender's refusal to comply with a court-ordered evaluation may inform a sentencing court's belief that he did not accept responsibility for his offense, that he posed a continuing danger to others or that he did not show much promise for rehabilitation – all traditional, legitimate sentencing considerations. *See Roberts v. United States*, 445 U.S. 552, 558 (1980) ("By declining to cooperate, petitioner rejected an 'obligatio[n] of community life' that should be recognized before rehabilitation can begin.").

However, the Idaho Supreme Court concluded that counsel was ineffective for failing to advise the defendant that he had a Fifth Amendment right to ignore the court

order without consequence at sentencing. Such an expansive interpretation of the privilege against self-incrimination compromises routine access to pertinent information about the offender gathered by psychosexual evaluations and compiled in presentence investigation reports. The likelihood that convicted defendants will comply with court-ordered testing is lessened by an appellate decision that the Fifth Amendment allows defendants to snub such evaluations without consequence.

Like Idaho, numerous state legislatures have adopted statutes either requiring or allowing courts to order a convicted offender to undergo a psychosexual or other psychological evaluation to assist them in choosing the appropriate sentence. *See, e.g.,* Colo. Rev. Stat. § 16-11-102 ("the court, in cases that it deems appropriate, may require the presentence report to include the findings and results of a professionally conducted psychiatric examination of the defendant"); Iowa Admin. Code § 201-38.4 (903B) ("A psychosexual assessment shall be conducted on all [serious sex] offenders, as a part of the presentence investigation (PSI) prior to sentencing."); Minn. Stat. § 609.3457 ("When a person is convicted of a sex offense, the court shall order an independent professional assessment of the offender's need for sex offender treatment to be completed before sentencing."); Mont. Code § 46-18-111 (requiring presentence investigation for sex crimes to include "psychosexual evaluation of the defendant and a recommendation as to treatment of the defendant in the least restrictive environment, considering the risk the defendant presents to the community and the defendant's needs"); Nev. Rev. Stat. § 176.139 ("If a defendant is convicted of a sexual offense for which the suspension of sentence or the granting of probation is permitted, the

division shall arrange for a psychosexual evaluation of the defendant as part of the division's presentence investigation and report to the court."); S.D. Codified Laws § 22-22-1.3 (person convicted of a sex crime "shall have included in the offender's presentence investigation report a psychosexual assessment including the following information: the offender's sexual history; an identification of precursor activities to sexual offending; intellectual, adaptive and academic functioning; social and emotional functioning; previous legal history; previous treatment history; victim selection and age; risk to the community; and treatment options recommended"); Tenn. Code Ann. § 39-13-704(2) (establishing "sex offender treatment board" which determined that psychosexual evaluations are useful tools in the treatment and evaluation of sex offenders); Vt. Stat. tit. 13 § 5405 ("The court shall order a presentence investigation which shall include a psychosexual evaluation of the offender."); Wash. Rev. Code § 9.94A.505 (legislature authorized trial court discretion to order psychosexual evaluations).

States without a specific statute authorizing psychosexual evaluations have interpreted their presentence investigation statutes as allowing a court to order such an evaluation. *See, e.g., Hines v. State*, 856 N.E.2d 1275, 1278 n.2 (Ind. App. 2006) (interpreting Indiana Code § 35-38-1-9); *State v. Thorkelson,* 84 P.3d 854, 857 (Utah App. 2004) ("while a psychosexual evaluation may be useful in sentencing, it is not mandatory").

Despite these legislative efforts to provide sentencing courts and corrections officials with more accurate information about sexual offenders' placement and treatment needs, questions about the breadth of *Mitchell's* no-adverse-inference rule leave states with an uncomfortable

uncertainty. It is unclear whether courts may enforce their orders for evaluations. It is unclear whether defense attorneys may advise their clients to cooperate with psychosexual evaluations. It is unclear whether prosecutors may urge courts to consider noncompliance for its relevance to a defendant's failure to accept responsibility, future dangerousness, lack of remorse or similar sentencing factors.

Emblematic of the uncertainty are the contradictory conclusions regarding the reach of the Fifth Amendment privilege adopted by appellate courts in the neighboring states of Idaho and Wyoming. As it now stands, sentencing courts in Wyoming may consider a convicted defendant's refusal to submit to a psychological evaluation in determining the appropriate penalty (*Lee v. State*, 36 P.3d 1133 (Wyo. 2001), but sentencing courts in Idaho may not (*Estrada v. State*, 149 P.3d 833 (Idaho 2006)). The Wyoming Supreme Court held: "A defendant's failure to cooperate in the PSI is certainly a valid factor for a trial court to consider in contemplating the appropriate sentence." *Lee v. State*, 36 P.3d at 1141.[2] In reviewing this state court decision on habeas, the Tenth Circuit noted: "it remains unanswered by the Supreme Court whether a sentencing court in a non-capital case may, for purposes other than determining the facts of the offense of conviction, draw an adverse inference from a criminal defendant's refusal to testify or cooperate." *Lee v. Crouse*, 451 F.3d 598, 605 (10th

[2] Other state courts have reached similar post-*Mitchell* decisions. *See, e.g., State v. Palmer*, 608 N.W.2d 378, 2004 WL 240012 (Iowa Ct. App. 2004); *State v. Muscari*, 807 A.2d 407, 416 (Vt. 2002); *State v. Blunt*, 71 P.3d 657, 662 (Wash. App. 2003) (sentencing court did not violate Fifth Amendment in noting defendant's failure to challenge State's proof of prior convictions).

Cir. 2006). The federal court therefore concluded that the Wyoming court's decision was not contrary to or an unreasonable application of clearly established federal law. *Id.* at 606.

The lack of clearly established federal law on this issue calls for resolution by this Court. The states need a definitive answer whether the privilege against self-incrimination allows defendants to skip court-ordered evaluations without suffering any consequence for their recalcitrance. The states' efforts to provide sentencing courts with the best possible information about sexual offenders will be thwarted by the continuing uncertainty posed by cases like *Estrada*.

II. Because sentence-enhancing facts must be found by the jury and not the sentencing judge under the Sixth Amendment, an expansion of the Fifth Amendment privilege at sentencing is not necessary to protect defendants from giving incriminating testimony about the crime which could increase the maximum penalty.

In delivering the majority opinion in *Mitchell v. United States*, Justice Kennedy acknowledged: "It is true, as a general rule, that where there can be no further incrimination, there is no basis for assertion of the privilege." *Mitchell v. United States*, 526 U.S. 314, 326 (1999). The majority reasoned, however, that "[w]here the sentence has not yet been imposed a defendant may have a legitimate fear of adverse consequences from further testimony." *Id.* In *Mitchell*, the "further testimony" sought from the defendant at sentencing involved the quantity of drugs she conspired to distribute. *Id.* at 320.

The *Mitchell* Court rejected the government's argument that the district court was entitled, based on her silence, to draw an adverse inference with regard to the amount of drugs attributable to her. *Id.* at 329. The Court then cited *Griffin v. California*, 380 U.S. 609 (1965) for the proposition that "in a criminal case . . . no negative inference from the defendant's failure to testify is permitted." *Id.* The Court declined to adopt an exception for "the sentencing phase of a criminal case with regard to factual determinations respecting the circumstances and details of the crime." *Id.*

Justice Kennedy, however, emphasized the narrowness of *Mitchell's* holding:

> Whether silence bears upon the determination of a lack of remorse, or upon acceptance of responsibility for purposes of the downward departure in [the federal sentencing guidelines] is a separate question. It is not before us, and we express no view on it.

Id. at 330.

Commentators have concluded that "[b]y limiting its opinion to inferences about facts alone, the Court left open the possibility that a valid assertion of the privilege could be considered for some purposes (assessing the defendant's character or willingness to cooperate, for example), but not other purposes (assessing the existence of particular historical facts relevant to sentence)." Wayne R. LaFave, Jerold H. Israel and Nancy J. King, 5 Criminal Procedure § 26.4 (2007); *see also* Anthony J. Phelps, *Applicability of the Fifth Amendment Privilege Against Self-Incrimination at Sentencing: Mitchell v. United States Settles the Conflict,* 38 Brandeis L. J. 107, 128 (1999-2000) ("The Court's

holding still allows a court's broad query into sentencing-related matters; it simply requires prosecutors to bear the burden of establishing essential sentencing-based facts, thereby preventing defendants from becoming witnesses against themselves.").

The *Mitchell* Court's holding that the Fifth Amendment prevents the government from relying on a convicted defendant's silence at sentencing to prove additional facts about the crime which could elevate the punishment predated significant changes in Sixth Amendment jurisprudence which limit the type of facts which may be left to a sentencing judge. A year after issuing *Mitchell*, this Court decided *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), holding that other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.

Apprendi ushered in a line of cases strengthening the Sixth Amendment jury trial right. In *Ring v. Arizona*, 536 U.S. 584, 610 (2002), this Court expanded *Apprendi*'s reach by holding that capital defendants are "entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." In *Blakely v. Washington*, 542 U.S. 296, 303 (2004), this Court clarified that the "statutory maximum" for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant. In *United States v. Booker*, 543 U.S. 220 (2005), this Court declared that the mandatory use of federal sentencing guidelines violated the right to jury trial on any fact required to enhance a criminal sentence. Finally, in *Cunningham v. California*, ___ U.S. ___, 127 S. Ct. 856 (2007), this Court found that California's

determinate sentencing law violated the Sixth Amendment, as understood in *Apprendi,* by granting the judge rather than the jury the power to find facts which raise the maximum lawful sentence.

In the wake of *Apprendi* and its progeny, a question arises whether the new constitutional rules for modern sentencing schemes should include an expansive reading of the Fifth Amendment privilege against self incrimination. Justice Kennedy's reasoning for the majority in *Mitchell* suggested a dichotomy between factual determinations respecting the circumstances and details of the crime and factors exhibited by the defendant, such as acceptance of responsibility or lack of remorse. *Mitchell v. United States*, 526 U.S. at 330.[3] Now that facts essential to the punishment must be determined by the jury's verdict alone, the *Mitchell* majority's concern about a convicted defendant's risk of giving incriminating testimony before the sentencing judge is abated.

This Court has interpreted the Fifth Amendment guarantee that no person be compelled in "any criminal case" to be a witness against himself as broader than the Sixth Amendment guarantee of a jury trial "in all criminal prosecutions." *See Counselman v. Hitchcock*, 142 U.S. 547, 563 (1892).[4] However, the Fifth Amendment's object is "to

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[3] The majority in *Cunningham* rejected Justice Kennedy's distinction between facts concerning the offense and facts concerning the offender for jury trial purposes. *Cunningham v. California*, 127 S. Ct. at 869 n.14.

[4] In his *Mitchell* dissent, Justice Scalia did not adhere to the *Counselman* observation, instead asserting that the phrase "in all criminal prosecutions" from the Sixth Amendment was "indistinguishable" from the "in any criminal case" terminology in the Fifth Amendment. *Mitchell v. United States*, 526 U.S. at 338 (Scalia, J., dissenting).

insure that a person should not be compelled, when acting as a witness in any investigation, to give testimony which might tend to show that he himself had committed a crime." *See United States v. Zucker*, 161 U.S. 475, 482 (1896). Thus, testimony about facts of the crime or the government's attempt to use the offender's silence to "infer commission of disputed criminal acts," even at sentencing, would implicate the Fifth Amendment. *See Mitchell*, 526 U.S. at 329. On the contrary, the results of an offender's psychosexual evaluation, or the use of the offender's refusal to submit to an evaluation to infer he is not amenable to treatment, would not implicate the Fifth Amendment. Where the fact considered by the sentencing court does not increase the punishment beyond its statutory maximum, the defendant would have neither a jury trial right under the Sixth Amendment nor would he be compelled to be a witness against himself under the Fifth Amendment.

In *United States v. Booker*, 543 U.S. at 233, this Court reiterated that the Sixth Amendment permits only the jury to find those facts which have fixed and predictable sentencing consequences, but also recognized that judges may consider factors not adjudicated at trial when making discretionary sentencing decisions. *See* Douglas A. Berman and Stephanos Bibas, *Making Sentencing Sensible,* 4 Ohio St. J. Crim. L. 37, 57-58 (2006). Professors Berman and Bibas describe this fact/judgment distinction as follows: "*Booker* safeguards the notion of sentencing as a distinct criminal justice enterprise that requires the exercise of reasoned judgment, not just offense fact-finding." *Id.* at 58.

This distinct enterprise of sentencing and the role of judicial discretion in reaching a "more enlightened and just sentence" was recognized in *Williams v. New York*, 337

U.S. 241, 251 (1949). In *Booker*, this Court cited *Williams* right beside *Apprendi* to support the statement: "We have never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range." *United States v. Booker*, 543 U.S. at 233. As such, *Apprendi*'s limit on judicial fact-finding at sentencing under the Sixth Amendment did not undermine *Williams*' approval of discretionary sentencing against a due process challenge. Kyron Huigens, *Solving the Williams Puzzle*, 105 Colum. L. Rev. 1048, 1056 (2005). Sentencing judges will be less able to carry out their specialized role if they are prohibited under the Fifth Amendment from considering a defendant's failure to cooperate with presentencing evaluations, a fact not reserved for the jury under *Apprendi*.

Under the regime started in *Apprendi*, fewer "factual determinations respecting the circumstances and details of the crime" are left to the sentencing court. As such, sentencing courts are focused on traditional factors influencing what penalty to assign based on the characteristics of a particular defendant, such as acceptance of responsibility, lack of remorse, risk of re-offending and amenability to rehabilitation. A defendant's decision whether to comply with a psychosexual evaluation or other aspects of the presentencing investigation bears on these traditional sentencing factors. Ordering the defendant to submit to a psychosexual evaluation does not compel him to be a witness against himself in a criminal case. It compels him to reveal facts about himself which are independent of the crime already adjudicated and useful to the discretionary assessment entrusted to the sentencing judge.

The reinvigoration of the jury trial right in criminal prosecutions allays the concern underlying *Mitchell* that a

defendant's decision to remain silent about a fact of the offense which the government sought to prove at sentencing should not give rise to an adverse inference by the sentencing court. The Idaho Supreme Court's decision failed to recognize the impact of *Apprendi* on the scope of the privilege against self-incrimination at sentencing. Granting the petition would provide this Court an opportunity to consider the interplay between Fifth Amendment and Sixth Amendment case law governing sentencing jurisprudence.

CONCLUSION

For these reasons, the *amici curiae* states respectfully request that the petition for writ of certiorari be granted.

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May 24, 2007